

# Annual Survey of Massachusetts Law

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Volume 1971

Article 15

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1-1-1971

## Chapter 12: Public Housing

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### Recommended Citation

Adkins, Robert H. and Pearlman, Daniel D. (1971) "Chapter 12: Public Housing," *Annual Survey of Massachusetts Law*: Vol. 1971, Article 15.

## C H A P T E R 1 2

### Public Housing

ROBERT H. ADKINS *and* DANIEL D. PEARLMAN

**§12.1. Introduction.** Public housing is any housing that is administered by an arm of the government for the purpose of housing low-income families and persons. In Massachusetts, the availability of public housing usually is restricted to families having an income of \$6000 or less at the time of admission and to elderly persons or couples with a maximum income of \$3000. Public housing in Massachusetts, unlike that in most other states,<sup>1</sup> is funded from two primary and separate sources. In addition to the federally financed public housing found in virtually all other parts of the country, Massachusetts has created and funded its own public housing programs. The purpose of this chapter is to provide an overview and a comparison of the state and federal public housing programs, and to discuss recent developments and issues in the management of public housing, with special emphasis on state-financed public housing and the rights of tenants.<sup>2</sup>

#### A. OVERVIEW OF FEDERAL AND MASSACHUSETTS PUBLIC HOUSING PROGRAMS

**§12.2. Massachusetts housing authorities.** State-financed public housing in Massachusetts is governed by Chapter 121B of the General Laws.<sup>1</sup> Chapter 121B creates in every city and town in the Commonwealth “a public body politic and corporate” known as the housing

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§12.1. <sup>1</sup> The only other states that have financed their own public housing are New York (see N.Y. Pub. Hous. Law (McKinney 1955) ) and Connecticut (see Conn. Gen. Stat. Rev. c. 128, §§8-38 et seq. (1971) ). State-financed public housing is not to be confused with the various state programs that assist private developers to build, own, and operate low- and moderate-income housing by providing mortgage money and/or mortgage insurance at below-market interest rates. The Mass. Housing Finance Agency administers mortgage assistance programs in Massachusetts. The mortgage assistance programs are described in G.L., c. 23A App., §§1-5.

<sup>2</sup> Issues such as the location, design, and construction of new public housing units are beyond the scope of this article. The authors wish to acknowledge at the outset that certain observations made in this article are the product of their personal experience in the public housing area and ought not to be attributed to outside sources.

§12.2. <sup>1</sup> Chapter 121B was added to the General Laws by the Acts of 1969, c. 751.

authority,<sup>2</sup> but further provides that no authority may transact business or exercise its powers until a need for the authority has been determined by the city officials or by the town meeting (as the case may be), and until a certificate of organization for the authority has been issued by the Commonwealth.<sup>3</sup> A housing authority is to be managed, governed, and controlled by five members, four of whom are to be appointed by the mayor (in a city) or elected by the town meeting (in a town).<sup>4</sup> In every case the fifth member is to be appointed by the Department of Community Affairs.<sup>5</sup>

Chapter 121B grants to housing authorities both broad corporate powers<sup>6</sup> and specific housing-related powers.<sup>7</sup> The former include, among others, the powers to sue and be sued, to receive loans and grants from any source, to acquire property by gift, purchase, or taking by eminent domain, to contract, to issue tax-exempt notes and bonds to finance its undertakings, to make rules and regulations, and other powers “necessary or convenient to carry out and effectuate the purposes of the relevant provisions of the General Laws.”<sup>8</sup> A housing authority does not have the power to tax, and must therefore depend for funds on the state or federal government.<sup>9</sup> The specific housing-related powers granted by Chapter 121B include the power to make studies of housing needs and markets, to conduct investigations and disseminate information as necessary, to provide housing projects for families and elderly persons of low income, to operate housing projects and establish rent schedules therefor, and to repair and remodel existing housing projects.<sup>10</sup>

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Chapter 751 gathered together in a separate chapter former Sections 26I - 26MMM, 43, and 44 of Chapter 121. Chapter 121B governs urban renewal and development as well as housing, but the former subject will not be discussed in this chapter.

<sup>2</sup> G.L., c. 121B, §3. Any number of cities and towns may join together with the approval of the Department of Community Affairs, a state agency, to form a regional housing authority to supplant their individual authorities. Id. §3A, added by the Acts of 1970, c. 851, §1. No such regional authorities had been created as of November 1971.

<sup>3</sup> G.L., c. 121B, §3. In determining the need for an authority, “the shortage of safe or sanitary dwellings available for families or elderly persons of low income at rentals which they can afford” must be taken into consideration. Ibid. Persons of low income are those whose annual net income is insufficient to enable them to maintain decent, safe, and sanitary housing. Id. §1. It is one of the purposes of the authority to provide housing for families or elderly persons of low income. Ibid.

<sup>4</sup> Id. §5. Membership in a housing authority is restricted to residents of the particular city or town; in a city, one member must be a representative of organized labor. Ibid. A tenant may be a member of a housing authority, but may not participate in decisions affecting his personal interest. Id. §6.

<sup>5</sup> Id. §5. The removal and compensation of housing authority members and internal administration of the authority is prescribed in Sections 6, 7, and 29 of Chapter 121B.

<sup>6</sup> Id. §11.

<sup>7</sup> Id. §26.

<sup>8</sup> Id. §11. Liability in contract and tort is regulated by id. §13.

<sup>9</sup> Because of the variety of programs providing housing funds, a particular housing authority may operate both federally financed and state-financed housing projects; but each project is a separate entity for management, financial, and accounting purposes.

<sup>10</sup> Additional powers are set forth for housing authorities having jurisdiction over

Chapter 121B also establishes standards for the operation of state public housing programs. The relationships between the housing authority and the various governmental supervisory bodies are described,<sup>11</sup> management, eligibility, and admission policies are set forth,<sup>12</sup> and provision is made for state financial assistance.<sup>13</sup> The operation and management of public housing is also subject to other state laws governing the maintenance of buildings, public health (notably the state sanitary code),<sup>14</sup> and landlord-tenant relations.<sup>15</sup> Public housing projects are exempt from local taxation but usually make payments in lieu thereof at a rate that is negotiated with the local municipality and is somewhat less in amount than the taxes that would otherwise be levied.<sup>16</sup>

**§12.3. Supervisory agencies.** The commitment of state or federal funds to a local housing authority and the use of such funds by the authority are supervised by the state and federal agencies having jurisdiction over the respective public housing programs. Supervision is exercised through the issuance of regulations<sup>1</sup> and through the control over the flow of financial assistance.<sup>2</sup> Federal programs are under the jurisdiction of the Department of Housing and Urban Development (HUD),<sup>3</sup> a cabinet-level department that has ten regional offices and numerous "area" offices in major cities.<sup>4</sup> HUD's housing programs are availed of throughout the country, and HUD publishes extensive mandatory regulations and advisory materials concerning its programs. Implementation of HUD's regulations and policies and the evaluation of housing authority project applications is the work of the area and regional offices. The national office makes general policy, allocates funds to the regions, and performs various research, program development, and evaluation functions.

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rural areas. G.L., c. 121B, §27.

<sup>11</sup> Id. §§31, 36.

<sup>12</sup> Id. §32.

<sup>13</sup> Id. §34 (veterans' and relocation housing), §§38-40 (housing for the elderly and the handicapped), §§42-44 (rental assistance). See §§12.6, 12.8, and 12.10, respectively, *infra*.

<sup>14</sup> The issuance of the sanitary code is authorized by G.L., c. 111, §§127A et seq.

<sup>15</sup> G.L., cc. 186, 239. Recent legislation under Chapter 186 is noted in §12.15 *infra*.

<sup>16</sup> G.L., c. 121B, §16.

§12.3. <sup>1</sup> The authority to regulate is given by statute. E.g., G.L., c. 121B, §29; 42 U.S.C. §1408.

<sup>2</sup> E.g., G.L., c. 121B, §34, which provides: "Each such contract [for state financial assistance] shall contain such limitations as to the development cost of the project and administrative and maintenance costs, and such other provisions, as the department may require." Similar power over federal financial assistance is vested in HUD by 42 U.S.C. §1415(4).

<sup>3</sup> In 1965, the powers and duties of the Housing and Home Finance Agency, including the public housing program, were transferred to the newly created Department of Housing and Urban Development (HUD) by the Act of Sept. 9, 1965, Pub. L. No. 89-174, §5, 79 Stat. 669 (42 U.S.C. §3534).

Throughout this chapter, reference will be made to regulations and provisions contained in various HUD publications: (a) Housing Management (HM); (b) Renewal Housing Management (RHM); and (c) Renewal Housing Administration (RHA).

<sup>4</sup> Massachusetts is within the jurisdiction of the HUD regional office in Boston.

Supervision of the state programs is the work of the Department of Community Affairs,<sup>5</sup> a major agency now under the Massachusetts Secretary of Communities and Development.<sup>6</sup> The department maintains one Boston office and conducts its business with all housing authorities in the state through field representatives of the department based in Boston. The Department of Community Affairs was created by Chapter 23B of the General Laws and is charged with broad responsibility for developing human resources through community development.<sup>7</sup> The department is directed by the Commissioner of Community Affairs, who is appointed by the governor for coterminous service.<sup>8</sup> Chapter 23B directs the department to advise and assist local communities on matters within its broad mandate, and to discharge the duties imposed on it by other statutes, such as those pertaining to housing.<sup>9</sup> The substantive responsibilities for housing are imposed on the department by various sections of Chapter 121B. Housing responsibilities include the allocation of funds to housing authorities for state programs,<sup>10</sup> the annual auditing of the accounts of local authorities,<sup>11</sup> and the review of plans for proposed housing projects before commitment of funds is made to local housing authorities.<sup>12</sup>

**§12.4. Tenant organizations.** Tenant organizations are taking an active role in the formulation of public housing policy. At the level of the local housing authority, their involvement has been facilitated by a statute requiring recognition of tenant organizations: "A housing authority or its designee shall meet at reasonable times with tenant organizations to confer about complaints and grievances; . . . The housing authority shall inform the tenant organizations of its decisions on any matters presented."<sup>1</sup> Tenant organization activity also extends to issues of statewide concern and to direct dealings with both HUD and the Department of Community Affairs.<sup>2</sup>

**§12.5. Family housing and housing for the elderly: The federal**

<sup>5</sup> The state-financed public housing program was created by Chapter 200 of the Acts of 1948. The program was placed under the Department of Community Affairs when that department was established by the Acts of 1968, c. 761.

<sup>6</sup> The administrative functions of the Secretary of Communities and Development are set forth in G.L., c. 6A, §8, as amended by Acts of 1970, c. 862, §3, and Acts of 1971, c. 204.

<sup>7</sup> The department is declared to be the "principal agency" of the Commonwealth for the mobilization of human, physical, and financial resources to provide open housing opportunities for residents of depressed slum areas; "the department shall cooperate with and render advice and counsel to local, commonwealth and federal agencies engaged in activities designed to further said objective; . . . [and] shall fund and advance the program of open and adequate housing for all citizens of the commonwealth. . . ." G.L., c. 23B, §3.

<sup>8</sup> *Id.* §1.

<sup>9</sup> *Id.* §3.

<sup>10</sup> The responsibilities for funding local programs are dispersed throughout G.L., c. 121B; see §29 (modernization), §34 (contracts for state financial assistance), and §44 (rental assistance).

<sup>11</sup> G.L., c. 121B, §29.

<sup>12</sup> *Id.* §31.

§12.4. <sup>1</sup> G.L., c. 121B, §32(g), added by Acts of 1968, c. 220.

**programs.** Federal public housing for the poor and the elderly<sup>1</sup> is financed and constructed under the federal program that was originally enacted in 1937.<sup>2</sup> The earliest federal housing projects in Massachusetts were contracted for prior to World War II, and are still in use today; they are typified by the clustered, high-rise, prisonlike structures that have been heavily criticized on sociological and aesthetic grounds, among others.<sup>3</sup> Each project begins with an application submitted to HUD by a local housing authority. Although HUD may have taken informal steps to encourage and assist in the preparation of the application, the formal power to initiate the application rests with the local authority.<sup>4</sup> Both HUD and the local town or municipal governing body must approve the application. The cost of construction<sup>5</sup> is financed with the proceeds of the sale by the housing authority of 40-year tax-exempt bonds. Under the terms of an annual contributions contract between HUD and the housing authority,<sup>6</sup> the government contracts to back the housing authority bonds with the full faith and credit of the United States and to pay the housing authority an annual contribution sufficient to cover the yearly payments of interest and principal that the housing authority must make to its bondholders.<sup>7</sup>

Originally, all operating expenses of the housing projects were to be met by rental income. In recent years, however, operating expenses have often exceeded rental income due to the fact that individual rents are limited to a fixed percentage of a tenant's income.<sup>8</sup> During the 1960s, to make up the difference between operating expenses and rental income, Congress authorized the payment of operating subsidies to the housing authorities based on the number of their tenants who are elderly, or who have large families or unusually low incomes, or have

<sup>2</sup> For a more extensive discussion of the activities of tenant organizations, see §12.16 *infra*.

§12.5. <sup>1</sup> As of August 1971, there were 29,918 units of federally financed public housing in Massachusetts, primarily in larger cities; of these units, 24,453 were constructed as family housing and 5465 as housing for the elderly. Mass. Dept. of Community Affairs, State and Federally Assisted Housing for Low and Moderate Income Families in Massachusetts (1971) [hereinafter cited as DCA Report].

<sup>2</sup> 42 U.S.C. §§1401 et seq.

<sup>3</sup> E.g., Friedman, *Public Housing and the Poor: An Overview*, 54 Calif. L. Rev. 642 (1966). This article contains a perceptive historical analysis of the conditions that have produced the current dissatisfaction with public housing.

<sup>4</sup> 42 U.S.C. §1415(7)(a).

<sup>5</sup> Construction costs include not only land acquisition costs and building expenses, but also architectural, engineering, and legal fees, and any other expenses involved in bringing the project to fruition.

<sup>6</sup> 42 U.S.C. §1410(a). The annual contributions contract is the basic agreement between HUD and the local housing authority with respect to the housing project; it sets out the terms of HUD's financial assistance as well as other conditions and requirements related to project construction and management.

<sup>7</sup> *Id.* §§1410, 1421a. HUD may now contract for annual contributions in excess of annual amortization expenses to meet a part of operating expenses. 42 U.S.C. §1410(b).

<sup>8</sup> *Id.* §1402(1). See §12.14 *infra*.

been displaced from their previous homes by public action.<sup>9</sup> In 1970, Congress authorized additional operating subsidies “to assure the low-rent character of the [housing] projects involved, and . . . to achieve and maintain adequate operating and maintenance services and reserve funds, including payment of outstanding debts.”<sup>10</sup>

*Admission.* Admission to federal public housing is determined on the basis of criteria that have been developed by each housing authority consistent with federal law.<sup>11</sup> In general, families are eligible for admission if family income<sup>12</sup> does not exceed a specified maximum (determined by the local authority with HUD approval).<sup>13</sup> Federal law does not prescribe eligibility requirements except to direct the authority to “give full consideration to its responsibility” to house displaced families and veterans and their families, and also to consider the applicant’s age, disability, housing conditions, need, and source of income.<sup>14</sup> A minimum period of residency as a precondition of eligibility appears to be constitutionally prohibited.<sup>15</sup> HUD does require, by regulation, that applicants for housing receive certain procedural rights, including written notice of eligibility or ineligibility, an informal hearing for those found ineligible, and notice of estimated date of occupancy.<sup>16</sup>

*Leases.* Each local housing authority designs its own lease form. In general, the leases drawn up by local housing authorities establish a month-to-month tenancy, contain other occupancy provisions similar to private dwelling leases, and require tenants periodically to

<sup>9</sup> See 42 U.S.C. §1410(a).

<sup>10</sup> See 42 U.S.C. §1410(a). The Act also authorized authorities to make expenditures for “tenant programs and services.” See *id.* §1402(6); Report of the Joint Conference on the Housing and Urban Development Act of 1970, H.R. Rep. No. 1784, 91st Cong., 2d Sess. 60 (1970).

<sup>11</sup> For a comprehensive discussion of admission requirements and procedures in federal public housing, with emphasis on New York and Massachusetts statutes, see Dale, *Gaining Admission to Low-Rent Public Housing*, 13 B.C. Ind. & Com. L. Rev. 35 (1971).

<sup>12</sup> The definition of family income typically excludes certain earnings of minors and unusual income such as life insurance benefits; in determining family income, a deduction is allowed for each dependent and for certain expenses. 42 U.S.C. §1402(1). In practice, income definitions are complex, detailed, and widely varying from one local housing authority to another. In implementing the Brooke Amendment rent ceiling (25 percent of family income), HUD has issued an income definition that may be widely followed by housing authorities in determining eligibility as well as in computing rents actually charged to tenants. See HM 7465.10.

<sup>13</sup> The maximum income at time of admission must be 20 percent below the income that would enable a family to obtain decent, safe, and sanitary housing on the private market. 42 U.S.C. §1415(7)(b)(ii). The Boston Housing Authority, as of November 1971, set a maximum income level of \$6000 for a family of four.

<sup>14</sup> 42 U.S.C. §1410(g)(2).

<sup>15</sup> *King v. New Rochelle Munic. Housing Authority*, 314 F. Supp. 427 (S.D.N.Y. 1970), *aff’d*, 442 F.2d 646 (2d Cir. 1971), *cert. denied*, 404 U.S. 863 (1971); *Cole v. Housing Authority of City of Newport*, 312 F. Supp. 692 (D.R.I. 1970), *aff’d*, 435 F.2d 807 (1st Cir. 1970).

<sup>16</sup> RHM 7465.5.

report their incomes for rent adjustment purposes.<sup>17</sup> In February 1971, HUD issued regulations establishing, for the first time, minimum lease standards that were to be met by all local housing authorities administering federally financed public housing.<sup>18</sup> The regulations create important rights for tenants, including the right to receive a rent abatement if the housing authority fails to repair a hazardous defect in the unit and the right to remain a tenant as long as there does not exist “good cause” for eviction. The lease regulations also create a right to a hearing on any dispute or grievance involving the authority and a tenant and arising under the lease. In order to implement the right to a hearing, HUD issued separate regulations setting forth minimum standards for such a grievance procedure.<sup>19</sup>

*Rents.* Rents are set as a percentage of “adjusted income,” which is defined as gross income after the exclusion of certain types of income, less deductions for dependents.<sup>20</sup> Subject to federal approval, each housing authority may establish its own definition of adjusted income and set its rent at any percentage of the tenant’s income that will generate sufficient receipts to meet expenses, as long as the rents do not exceed 25 percent of the tenant’s income.<sup>21</sup>

*Eviction.* The subject of eviction from federal housing is discussed later in this chapter.<sup>22</sup>

**§12.6. Family housing and housing for the elderly: The Commonwealth’s programs.** All of the existing state-financed family housing units have been built under the authority of Chapter 200 of the Acts of 1948,<sup>1</sup> which established a program known as veterans’ housing because it was originally passed to provide housing for veterans of World War II.<sup>2</sup> No units have been built under this program since 1953.<sup>3</sup> The construction of additional family units has been authorized by Chapter 705 of the Acts of 1966,<sup>4</sup> and funds have

<sup>17</sup> Achtemberg, Pearlman, and Pynoos, *The Beaucroatic Wasteland: A Report on Tenants’ Rights in Public Housing in Massachusetts* (MIT-Harvard Joint Center for Urban Studies 1971) (an unpublished report) [hereinafter cited as *Tenants’ Rights Report*].

<sup>18</sup> RHM 7465.8, which is discussed more thoroughly in §12.11 *infra*.

<sup>19</sup> RHM 7465.9, which is discussed more thoroughly in §12.11 *infra*.

<sup>20</sup> 42 U.S.C. §1402(1); HM 7465.10.

<sup>21</sup> 42 U.S.C. §1402(1). For a more extensive discussion of rent ceilings in federal and state public housing, see §12.14 *infra*.

<sup>22</sup> See §§12.11, 12.12 *infra*. Eviction from government subsidized, privately owned housing is discussed in §12.19 *infra*.

§12.6. <sup>1</sup> The construction of public housing is also authorized by the relocation housing provisions (G.L., c. 121B, §37), but no such housing presently exists and no funding is available.

<sup>2</sup> The veterans’ housing program is presently codified as G.L., c. 121B, §§31, 34. Of the 15,060 units operated under this program, 96 percent contain three or fewer bedrooms and are unsuitable for families with more than four children. Mass. Dept. of Community Affairs, *Public Housing Resources in Massachusetts* 41 (1970) [hereinafter cited as *Public Housing Resources*].

<sup>3</sup> Conversation with Christopher McCarthy, member of the management housing staff of the Department of Community Affairs.

<sup>4</sup> The provisions of Chapter 705 are codified in G.L., c. 121B, §§31, 34. Under the



been committed.<sup>5</sup> Each project built under the Chapter 705 program is limited to a maximum of 100 units and must be geographically separated from other public housing projects.<sup>6</sup> Despite the availability of funds, no units have as yet been constructed under the Chapter 705 program.<sup>7</sup> Reasons often advanced for the dormancy of construction include community opposition to family public housing and the popularity of the Commonwealth's program of housing for the elderly.

Housing for the elderly is authorized by Chapter 667 of the Acts of 1954.<sup>8</sup> Although the program carries a separate funding limit, it is otherwise similar in most other administrative respects to the family housing program. Housing for the elderly is available solely to persons over 65 years of age, is almost exclusively of one-bedroom size, and is physically separate from other public housing.<sup>9</sup>

Each project, whether for family housing or housing for the elderly, begins with an application to the Department of Community Affairs, the application consisting of the plans and description of the project, its estimated cost, the proposed method of financing, and estimated revenue and expense schedules.<sup>10</sup> The department must ensure that the plans and descriptions submitted adhere to existing health,

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Chapter 705 program, local housing authorities are empowered to construct housing, to purchase or lease dwellings recently constructed by private developers, to purchase or lease older housing, or to purchase and rehabilitate older housing, but the acquisition power apparently does not include the turnkey construction method successfully used for federal public housing. Under the turnkey method, a housing authority negotiates with a private developer to build public housing that, after completion, is purchased by the authority. The acquisition of completed housing under Chapter 705 is restricted to housing built without prior request or negotiation by the housing authority so as to avoid conflict with statutory public bidding requirements (G.L., c. 149, §44A). See *Commissioner of Labor and Indus. v. Lawrence Housing Authority*, 1970 Mass. Adv. Sh. 1323, 261 N.E.2d 331 (federal turnkey housing does not violate competitive bidding statute).

<sup>5</sup> The Chapter 705 program was funded by the transfer of \$37.5 million from the then defunct veterans' housing program. Acts of 1966, c. 731. Although the money has not yet actually been appropriated, the legislature has authorized the sale of bonds by housing authorities up to the full amount of the funding to finance new construction under the Chapter 705 program. G.L., c. 121B, §34. Since any bonds issued will be backed by the full faith and credit of the Commonwealth, the legislature is obligated to appropriate annual contributions as the bonds are issued.

<sup>6</sup> G.L., c. 121B, §31.

<sup>7</sup> As of November 1971, \$12.5 million (representing approximately 430 units, mostly of three-bedroom size or larger) had been committed on the basis of applications from housing authorities. The first units are expected to be ready for occupancy in the summer or fall of 1972.

<sup>8</sup> The provisions of Chapter 667 are codified in G.L., c. 121B, §§38-41. Elderly housing has been enthusiastically embraced in recent years; projects containing 13,241 units have been constructed, 3739 of the units having been built in communities where the local housing authority operates no other public housing. Public Housing Resources. The preference for elderly housing over family public housing is often explained as a reflection of the feeling of most housing authority members that the elderly are "deserving poor," and that the absence of children and "problem" families makes it easier to manage housing units occupied by the elderly.

<sup>9</sup> G.L., c. 121B, §§38, 39.

<sup>10</sup> *Id.* §31.

sanitation, and safety standards; that the financing proposal is sound—that the project can meet expenses (with the assistance of governmental subsidies); and that rents may be set within the means of low-income tenants without creating a deficit.<sup>11</sup> State financial assistance is provided under a contract in which the Commonwealth guarantees the notes or bonds of the housing authority issued to finance the project, and promises to make annual contributions.<sup>12</sup> The annual contribution from the Commonwealth is to be used to pay the debt service on notes or bonds issued by the authority, but in any case the amount of the contribution per year may not exceed 6 percent of the cost of the housing project.<sup>13</sup>

*Admission.* Admission to available units is determined by each housing authority in accordance with state law, which, unlike federal law,<sup>14</sup> sets forth detailed standards of eligibility and orders of preference among eligible applicants.<sup>15</sup> Different orders of preference are set out in several places in Chapter 121B,<sup>16</sup> but none of the preference orders is correlated with the others. Consequently, the preference to which a given applicant is entitled may be in some doubt. In practice, access to available units is all too often determined by political influence rather than by statutory preference.<sup>17</sup> Confusion continues, both as to what is required by statute and what happens in practice,

<sup>11</sup> *Ibid.* In addition, where construction of a family housing project is proposed, the department must hold a public hearing in the city or town where such housing would be located. After hearing testimony, the department must determine, before approving the proposed project, whether, *inter alia*, “. . . the design and layout of the proposed project is appropriate to the neighborhood in which it is to be located; and . . . [whether] an adequate supply of dwelling units for families of low income is not then available in the private market. . . .” *Ibid.* Elderly housing projects are expressly exempted from the above requirements of a public hearing and department determinations. However, if an elderly project is proposed in a town where another elderly project or a Chapter 200 veterans’ family project already exists, the construction of the new project must be approved by vote of the town meeting. G.L., c. 121B, §39.

<sup>12</sup> *Id.* §§34 (veterans’ housing), 41 (elderly housing).

<sup>13</sup> *Id.* §34, as amended by Acts of 1971, c. 1114, §3, which raised the annual contribution percentage for Chapter 200 veterans’ family projects and elderly housing from 4 to 6 percent. The maximum percentage authorized for Chapter 705 family housing (none of which has yet been built) was raised from 5 to 6 percent. Prior to the passage of Chapter 1114, the Commonwealth’s annual contribution was not sufficient to fully pay the debt service, and funds had to be diverted from revenues ordinarily used for maintenance and services. The diversion of operating funds, plus the absence of operating subsidies (which were available only from the federal government for federal public housing programs) meant that state public housing rents were higher than federal rents, and the upkeep of state public housing faltered. Mass. House Bill 5000 (1970) (Report of the Joint Comm. on Urban Affairs Relative to Public Housing) [hereinafter cited as House Bill 5000].

<sup>14</sup> Federal admission standards are set forth in §12.5 *supra*.

<sup>15</sup> Maximum income limits and citizenship requirements are set out in G.L., c. 121B, §32. Applicants for elderly housing must be at least 65 years of age; they may live alone, with other eligible persons whether or not related, or with a nonelderly low-income person “necessary to the physical welfare of the elderly occupant.” *Id.* §40.

<sup>16</sup> Two separate orders of preference are described in G.L., c. 121B, §32, and a third (applying only to Chapter 200 veterans’ family housing) appears in §34, second paragraph. No preference based on veterans’ status is given to applicants for elderly housing. *Id.* §40(d).

<sup>17</sup> House Bill 5000. One of the preference orders implicitly gives first priority to

despite the legislative admonition to the department to “promulgate rules and regulations relative to uniform standards for tenant selection which shall establish the order of priority governing the selection of tenants,” and by which a housing authority thereafter is to be bound in its selection of tenants.<sup>18</sup>

*Leases.* Lease forms for the Commonwealth’s public housing are drawn up by each individual housing authority. A model lease form, with appropriate comments thereon, was promulgated by the department,<sup>19</sup> but it has apparently been universally ignored by authorities.<sup>20</sup>

*Rents.* Rents are computed on the basis of the tenant’s income: no tenant may be charged more than 25 percent of his income as rent if utilities are included or more than 20 percent of his income if utilities are not included.<sup>21</sup>

*Eviction.* The subject of eviction from state public housing is discussed later in this chapter.<sup>22</sup>

**§12.7. Modernization: The federal program.** The federal modernization program was created by HUD administrative action in 1967.<sup>1</sup> It has provided substantial amounts of money for the renovation of federal housing projects and has served as a catalyst for a wide range of reforms in management policies and practices.<sup>2</sup> The program is designed to assist in “upgrading those low-rent housing projects which, for reasons of physical condition, location, and outmoded management policies, adversely affect the quality of living of the tenants.”<sup>3</sup> A modernization proposal must include not only the renovation of physical plants but also, more significantly, the development of more effective management and administrative policies. The housing authority is required to involve tenants actively in planning both the physical modernization of the project and the necessary changes in management policies and practices. The housing authority is also required to do both as to what is required by statute and what happens in practice,

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applicants in the greatest “need.” G.L. c. 121B, §32(f). “Need” is not defined by statute or regulation, in effect giving the authority broad discretion to allocate vacancies for any reason—including political influence—that may be camouflaged by a finding of “need.”

<sup>18</sup> G.L., c. 121B, §34(h). There is also identical language with respect to elderly housing. See *id.* §40(f).

<sup>19</sup> Mass. Dept. of Community Affairs, Memorandum to Local Housing Authorities from Deputy Commissioner Richardson, Subject: Model Dwelling Lease (Aug. 12, 1970) [hereinafter cited as DCA Lease Memorandum].

<sup>20</sup> Tenants’ Rights Report.

<sup>21</sup> Acts of 1970, c. 853, amending G.L., c. 121B, §40 (elderly housing); Acts of 1971, c. 1114, §1, amending G.L., c. 121B, §32 (family housing). Each of the above noted sections authorizes a special subsidy to cover operating expenses not met by rental revenues. For a more extensive discussion of rents in state public housing, see §12.14 *infra*.

<sup>22</sup> See §12.12 *infra*.

§12.7. <sup>1</sup> RHA 7485.1 contains the current HUD regulations governing the modernization program.

<sup>2</sup> More than \$10 million has been expended in Boston under the modernization program.

<sup>3</sup> RHA 7485.1.

velop both long-range and short-range plans for (1) expanding community service programs and community facilities where needed in the public housing projects; (2) assisting low-income families in realizing their potential for economic advancement; and (3) increasing the employment of tenants by the housing authority.<sup>4</sup>

**§12.8. Modernization: The Commonwealth's program.** The Commonwealth's modernization program, established in 1970, provides funds for the physical improvement of state-financed family and elderly housing projects.<sup>1</sup> A maximum of \$5 million may be spent in the program in each of three years.<sup>2</sup> Although probably little money will be spent on elderly projects, most of which were constructed fairly recently, the \$15 million will still have only limited impact on the 15,000 veterans' project family units, all of which are much older and consequently much in need of repair.<sup>3</sup> An average of \$1000 per unit will be available for making necessary repairs that by now often include complete interior renovation of the unit, major repairs of heating, plumbing, and wiring, and structural repairs to the building.<sup>4</sup> The regulations of the Department of Community Affairs require that specific items for physical improvement be determined jointly by the housing authority and the affected tenant organizations.<sup>5</sup> In addition, the application must detail plans for substantial "nonphysical" improvements such as changes in management policies, lease provisions, grievance procedures, and increased tenant participation in management decision-making. The nonphysical improvements must be made during the second year following the first modernization grant.<sup>6</sup>

**§12.9. Leased housing: The federal program.** The federal leased housing program, commonly known as the Section 23 program,<sup>1</sup> was established in 1965. Under the Section 23 program, the local housing authority leases a number of housing units from a private owner, then

<sup>4</sup> Ibid.

§12.8. <sup>1</sup> Acts of 1970, c. 694, §§1-4. Section 2 of Chapter 694 inserted G.L., 121B, §26(j), which provides in part that a housing authority is empowered "[t]o undertake as a separate project the renovation, remodeling, reconstruction, repair, landscaping and improvement of any existing housing project or part thereof. . . . Each such project shall be undertaken in accordance with rules and regulations promulgated by the department for such projects."

<sup>2</sup> Acts of 1970, c. 694, §1.

<sup>3</sup> The oldest state-financed elderly housing project was constructed in 1956, whereas the most recent veterans' housing project was built in 1953.

<sup>4</sup> Maintenance and repair needs have been aggravated by the parsimonious level of state financial assistance. Many housing authorities have been compelled to use maintenance funds for debt service.

<sup>5</sup> Mass. Dept. of Community Affairs, Rules and Regulations for Modernization Projects (Mar. 16, 1971).

<sup>6</sup> Ibid.

§12.9. <sup>1</sup> 42 U.S.C. §1421b, as amended by the Housing and Urban Development Act of 1965, §23. 42 U.S.C. §1410(c) also authorizes local housing authorities to lease housing obtainable on the open market, but under arrangements somewhat different than under Section 1421b. Under the Section 1410(c) program, the units leased need not be privately owned and leases may extend up to 40 years. In addition, these units must be exempted

subleases the units to individual tenants.<sup>2</sup> The owner receives the same rent he would receive on the open market, a portion of which is paid by the tenant in accordance with the public housing rent schedule and the remainder of which is paid by the housing authority.<sup>3</sup> The owner remains responsible for all property taxes and maintenance of the unit.<sup>4</sup> In return, the housing authority generally guarantees payment of the tenant's share of the rent and payment for any damages caused by the tenant but not paid for by him. A housing authority administering units under the Section 23 program receives annual contributions from HUD in an amount based on the number and size of units to be leased.

Admission to leased housing units is determined by a method negotiated between the housing authority and the owner. The method is generally similar to one of the following: (1) the owner may lease his unit directly to the housing authority, which then places in the unit the applicant at the top of its waiting list for public housing; (2) the owner may be allowed to choose his tenant from a small list of applicants provided by the housing authority; or (3) a tenant may himself locate a unit and a willing owner.<sup>5</sup> Tenant eligibility requirements are the same as for the local authority's other federal public housing. The lease between the owner and the housing authority may be from 1 to 10 years in duration, with options to renew, for a total lease period of 15 years for existing structures and 20 years for new construction.<sup>6</sup> In all cases, the unit must comply with local and state health codes, and the rent must be set at a rate which does not exceed that permitted by the annual contributions contract between HUD and the authority for a unit of the size and type involved.<sup>7</sup>

**§12.10. Rental assistance: The Commonwealth's program.** The rental assistance program, commonly known as the Chapter 707 program, was established in 1966 to supplement the then-existing public housing programs by providing for leasing privately owned dwellings from their owners and subleasing the housing units to eligible tenants.<sup>1</sup> The Chapter 707 program is similar in many respects to the federal Section 23 program but differs in several important details:<sup>2</sup>

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from local property taxes, paying instead the lower "payment in lieu of taxes" also paid on behalf of public housing owned by housing authorities. Regulations for both programs are found in RHA 7430.1.

<sup>2</sup> 42 U.S.C. §§1421b(a), (c).

<sup>3</sup> Id. §1421b(d).

<sup>4</sup> Id. §§1421b(d)(4), (f).

<sup>5</sup> Id. §1421b(c).

<sup>6</sup> Id. §1421b(d).

<sup>7</sup> Ibid.

§12.10. <sup>1</sup> Acts of 1966, c. 707, now codified as G.L., c. 121B, §§42-44.

<sup>2</sup> Important similarities between the state and federal programs include the requirements that the unit comply with the state sanitary code and that the tenant's share of the rent not exceed 25 percent of his income. G.L., c. 121B, §§43, 44, as amended by Acts of 1971, c. 1114, §8.

leases may be executed for terms of 1 to 5 years,<sup>3</sup> terms substantially shorter than the 15 to 20 years obtainable in federal leased housing; furthermore, tenant eligibility for a rental assistance unit is subject to the statutory mandates applicable to other state public housing,<sup>4</sup> including the complex preference requirements not found in federal housing programs; finally, under the Chapter 707 program, an eligible tenant may himself locate an eligible unit and a willing owner not presently under the program, and the local housing authority is then *required* to enter into a rental assistance lease.<sup>5</sup> One significant difference that has been eliminated concerned the funding of the two programs. Although formerly funds for the rental assistance program were disbursed quarterly, the program can now be funded by a long-term grant under an annual contributions contract with the Commonwealth.<sup>6</sup> Such a funding arrangement will facilitate program expansion by removing much of the funding uncertainty that existed in the past.

## B. RECENT DEVELOPMENTS AND CURRENT ISSUES

**§12.11. Lease forms and grievance procedures in federal public housing.** In past years, virtually all public housing leases have contained lengthy recitations of tenant duties and obligations but little or no description of the duties and obligations of local housing authority management. The failure of leases to provide for mutual duties and obligations has now been substantially corrected with respect to leases used in federal public housing. In February 1971, as the result of lengthy negotiations between HUD, the National Tenants Organization, and the National Association of Housing and Redevelopment Officials, HUD announced mandatory lease provisions for all federal housing projects in the country.<sup>1</sup> The lease provisions, among other things, require the housing authority to maintain the housing units in good repair and to allow tenants a rent abatement if hazardous defects are not repaired within 72 hours after the tenant notifies management of the defects. A representative of the housing authority may

<sup>3</sup> G.L., c. 121B, §43.

<sup>4</sup> To further confuse the already uncertain situation with respect to preferences in admission to public housing, both family and elderly, G.L., c. 121B, §44 adds a fourth preference order to the three set out elsewhere in Chapter 121B. See §12.6 n.16 *supra*. The statute fails to indicate whether the Section 44 preference order is to apply only to the rental assistance program and in substitution for existing preferences, or whether it must somehow be integrated with the others.

<sup>5</sup> Whether a tenant is thus granted a right to receive rental assistance is discussed in §12.13 *infra*.

<sup>6</sup> Acts of 1971, c. 1114, §7, amending G.L., c. 121B, §43.

§12.11. <sup>1</sup> RHM 7465.8. The circular that established the mandatory lease provisions was issued simultaneously with a circular that established a grievance procedure for use by housing authorities. RHM 7465.9. As official regulations of HUD, the circulars have the force of law. See *Thrope v. Housing Authority II*, 393 U.S. 268 (1969). These circulars set forth the first comprehensive mandatory standards for tenant-management relations ever established by HUD.

enter a tenant's unit for nonemergency reasons only during reasonable hours and only then after advance written notice of intended entry. A tenant's lease may be terminated only upon "good cause"<sup>2</sup> and after 30 days' advance written notice of the impending termination. When a housing authority intends to terminate a tenancy, the HUD lease provides that the tenant shall be informed in a private conference of the reasons for the termination. The tenant may then elect to have the reasons reviewed at a hearing under a grievance procedure.

In a separate circular issued on the same day, HUD described the basic provisions of the grievance procedure to be included in every federal public housing lease, and attached a model grievance procedure to be used as a form.<sup>3</sup> The mandatory procedure provides, *inter alia*, that a tenant has the right to challenge any action or failure to act on the part of a local housing authority under its prerogative as described either in the lease or in the authority's regulations, policies, or procedures; that the arbitrator<sup>4</sup> under the grievance procedure is to be impartial; that the tenant has the right to be represented by counsel and to cross-examine witnesses; and that the tenant has the right to receive a written decision from the arbitrator.

Neither the model lease nor the grievance procedure circular requires the use of a particular lease form or grievance procedure. The grievance procedure circular describes the required provisions in general language and includes the model procedure as an example. The lease circular describes the "topics" that must be covered in the lease actually adopted by the housing authority, but does not state what the specific provisions for each topic must be. The circular instead states that the corresponding provisions of an attached model lease form describe the "minimum responsibilities and obligations of each of the parties" (the parties being the housing authority and the tenant). The rationale for not simply issuing a mandatory lease and a mandatory grievance procedure was presumably to allow local authorities and tenant organizations flexibility to adapt their leases and grievance procedures to local needs and applicable state laws. An inherent problem in HUD's approach is that it leaves to the discretion of local housing authorities substantial areas of possible controversy between tenants and management. Since public housing tenants often lack the organization, knowledge, and experience necessary to bargain effectively with a housing authority, areas that are not specifically covered by the lease and the grievance procedures may become heavily weighted against tenant interests.

Implementation of the requirements of the circulars by local housing

<sup>2</sup> The lease furnishes five examples to aid in the interpretation of "good cause": non-payment of rent, repeated or serious interference with other tenants' rights, repeated or serious damage to the premises, creation of physical hazards, and the tenant's receipt of income in excess of the maximum allowed for continued occupancy. RHM 7465.8.

<sup>3</sup> RHM 7465.9.

<sup>4</sup> The arbitrator may be a neutral individual or a panel composed equally of management and tenant representatives and one neutral member.

authorities has been gradual because HUD specified no deadlines; presumably, a reasonable time for implementation can be implied. HUD has encouraged compliance in some cases by conditioning release of certain housing program funds upon implementation of the requirements. In spite of the failure of local housing authorities to implement the circulars' requirements formally, the rights granted to tenants under the new provisions have been held to have vested immediately upon issuance of the circulars.<sup>5</sup>

The Massachusetts Union of Public Housing Tenants<sup>6</sup> has developed a model lease for use in both state and federal public housing. The lease is intended to meet four goals: (1) to satisfy the requirements of both state and federal public housing programs so that a housing authority may use one lease for all its units; (2) to incorporate the latest developments in federal and state law and regulations (including the HUD circulars discussed above); (3) to reflect the current trend of including responsibilities of both management and tenants in public housing leases; and (4) to clarify the language of the lease itself. The lease has been drafted as a model only; the provisions must be modified by housing authorities and local tenant organizations to meet local needs. The lease has now been adopted in its entirety or in part in a number of communities.<sup>7</sup>

**§12.12. Evictions from the Commonwealth's public housing.** Massachusetts lags far behind HUD in recognizing tenants' rights in its public housing. In G.L., c. 121B, §32, however, Massachusetts does provide two basic rights with respect to eviction: (1) that eviction (termination of the tenancy) be only for cause; and (2) that prior to eviction the tenant receive a written notice of the reasons for the eviction and the opportunity (except in cases of nonpayment of rent) for a hearing.<sup>1</sup> The meaning of *cause* and the requirement of a hearing

<sup>5</sup> *Glover v. Bessemer Housing Authority*, 444 F.2d 158 (5th Cir. 1971) (eviction invalidated because tenant had not received a hearing that met the standards described in RHM 7465.9, notwithstanding the initiation of eviction proceedings and a lockout of the tenant in 1970, prior to the issuance of the circular); *Chicago Housing Authority v. Harris*, 49 Ill. 2d 274, 275 N.E.2d 353 (1971) (eviction invalidated because of failure to provide a hearing meeting HUD's requirements; the housing authority had argued that HUD's circular was invalid). The circulars were issued on Feb. 22, 1971.

HUD's authority to prescribe minimum standards for local housing authority leases and grievance procedures has been challenged in a class action brought by local housing authorities in various parts of the country, including the housing authority in Quincy, Massachusetts. The plaintiffs claim that the prescription of such standards was outside the scope of HUD's authority and that the standards were improperly issued under the federal administrative procedure act. *Omaha Housing Authority v. United States Housing Authority*, Civil No. 70-0-287 (D. Neb., filed July 22, 1971). Similar contentions were raised in the *Glover* and *Harris* cases but were dismissed by the respective courts.

<sup>6</sup> The union is a statewide umbrella group that shelters local tenant organizations. It is more extensively described in §12.16 *infra*. The lease was drafted for the union by the Mass. Law Reform Institute.

<sup>7</sup> E.g., Cambridge, Chelsea, Fall River, Lowell, Lynn, and Somerville.

§12.12. <sup>1</sup> G.L., c. 121B, §32 provides in part: "The tenancy of a tenant of a housing authority shall not be terminated without cause and without reasons therefor given to



have not been defined, however, in the statute, regulations, or judicial decision; in practice, the statutory rights have been ignored or narrowly interpreted by many local housing authorities.

Predictably, controversies have arisen between tenants and housing authorities over the specific reasons that may be included in the definition of *cause*. At the extreme, it may be argued that *cause* means only that the housing authority have a reason for evicting the tenant, and any reason will suffice. Such an interpretation, however, would fail to take into account the fact that even before the requirement of cause was enacted, a housing authority could evict its tenants at will, provided proper notice was given.<sup>3</sup> If the cause requirement were read to leave a housing authority as the sole judge of the propriety or adequacy of its reasons for terminating a tenancy, then its freedom to terminate would remain absolute, unaffected by the addition of the cause requirement. It may also be argued that the cause requirement was not intended to limit the freedom to terminate, but rather to force the housing authority to disclose to the tenant the reason for his termination. Such a "notice" interpretation, however, would overlook the fact that the amendment imposing the cause requirement also directed the housing authority to give the tenant, prior to termination, a written statement detailing the reasons for the termination.<sup>4</sup> Reading the cause requirement as a notice requirement would make the required written statement redundant; the cause provision should be read so as to avoid such a result.

The obvious legislative intent of the cause requirement was to limit the permissible reasons for terminating a tenancy. The lack of specificity of the statute leaves in doubt, however, the limit actually intended. Nonpayment of rent and serious and intentional destruction of a dwelling unit would no doubt fall within the meaning of cause. On the other hand, the nailing up of pictures on a wall, a conviction for drunken driving, or vigorous complaints about housing authority man-

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said tenant in writing. A tenant at his request shall, except in the case of nonpayment of rent, be granted a hearing by a housing authority at least fifteen days prior to any such termination. The housing authority's determination of cause shall be reviewable in the district court whenever an action for summary process is brought for possession of the premises."

<sup>2</sup> The cause requirement was originally enacted by Acts of 1968, c. 596.

<sup>3</sup> Before the addition of the cause requirement, most state public housing leases created a month-to-month tenancy at will which could be terminated by the local authority or the tenant for any reason, provided proper notice was given. The notice was to signify only the intent to terminate on a certain date and was not required to state reasons for the termination. A 14-day notice was required to terminate a tenancy where the cause was nonpayment of rent. G.L., c. 186, §§11, 12. A notice of one rental period (usually a month) in advance was required in all other cases. *Id.* §12. Obviously the public housing "lease" did not provide the tenant with the security found under private leases, which normally specify terms of one year or more and contain express statements of tenant duties, the breach of which would be the only permissible grounds for a termination of tenancy.

<sup>4</sup> G.L., c. 121B, §32.

management would not seem important enough to come within "cause."<sup>5</sup> Some insight into the intended meaning of *cause* may be gained from a consideration of the primary purpose of the public housing statutes themselves, namely, to provide decent, safe, and sanitary housing that is within the means of, and is intended primarily to benefit, low-income families.<sup>6</sup> A tenancy should not be terminated unless the tenant's behavior frustrates the achievement of the purpose of public housing with respect to the tenant himself or to other tenants, and only when no remedy other than termination is adequate to prevent the frustration of the statute's purpose. To accommodate the purpose of the public housing statute,<sup>7</sup> therefore, two tests should be satisfied before a tenancy can be terminated: (1) the behavior of the tenant must be materially and demonstrably detrimental to the welfare of other project tenants, and (2) other, less drastic means to remedy the wrong must have failed or be unavailable.

If the above tests were adopted, many of the reasons presently advanced as justification for termination would no longer be permitted. A termination based on management-tenant hostility arising from a tenant's vociferous and incessant complaints about poor housing project maintenance would fail to satisfy the first test, since such complaints would not be detrimental to the welfare of other tenants. An arrest or conviction on a charge of drunken driving would not detrimentally affect the welfare of other tenants, and would therefore fail the first test also. Termination for nailing up a picture would fail the second test, because it would be more appropriate to charge the tenant for any damage that was actually done or deduct such a charge from his security deposit. Only if the destruction were a part of a lengthy series of major and minor injuries to project property would termination be in order.

The present uncertainty over the definition of *cause* could be resolved by the issuance of departmental regulations that would define the word, perhaps in terms of the five reasons suggested by HUD in its regulations.<sup>8</sup> Such a definition would still have to be applied to each individual fact situation, but the possibility of arbitrary or vindictive evictions would be greatly reduced.

*Preeviction hearing.* The other important tenant right with respect to eviction provided by G.L., c. 121B, §32 is the right to a preeviction hearing. Two major questions have arisen concerning the hearing:<sup>9</sup>

<sup>5</sup> In practice, reasons such as these have often supplied the "cause" for eviction. Tenants' Rights Report.

<sup>6</sup> E.g., the declaration of necessity for the rental assistance program states in part: "It is hereby declared . . . that there does not now exist within the commonwealth an adequate supply of decent, safe and sanitary dwelling units available at rents which families of low income can afford without depriving themselves of the other necessities of life. . . ." G.L., c. 121B, §42.

<sup>7</sup> In light of the purpose of the federal housing statutes, HUD has interpreted its "good cause" requirement in a manner consistent with the two tests noted in the text. See §12.11 n.2 *supra*.

<sup>8</sup> See §12.11 n.2 *supra*.

<sup>9</sup> The statute, G.L., c. 121B, §32, is quoted in n.1 *supra*.

(1) What form must the hearing take? (2) Can the hearing be constitutionally denied in nonpayment cases? In determining the form of the hearing, the sole aid in interpreting the statute is its purpose: the prevention of improper or unfair termination of a tenancy. Improper terminations can be prevented only by providing an administrative forum for the consideration of all the facts, circumstances, and defenses present in each individual case.

The appropriate form for the hearing is the one that will most completely and truthfully reveal all the pertinent facts and circumstances, that will allow the tenant to present his defenses effectively, and that at the same time will respond to the demands of administrative economy. Courts in other jurisdictions have recognized the necessity of the preeviction administrative hearing and have set out some of the procedural safeguards essential to an adequate hearing: (1) the right of the tenant to representation by an attorney or other knowledgeable person; (2) prior notice to the tenant of the reason for the termination of his tenancy, and disclosure in the notice of the facts the housing authority is relying upon in seeking the termination; (3) the right of the tenant to present witnesses on his behalf and to cross-examine opposing witnesses; (4) a decision maker who is not associated with the local housing authority and who is otherwise impartial; and (5) a written decision that sets forth the facts as found by the decision maker and the reasons supporting his decision.<sup>10</sup> Insofar as the above procedures are constitutionally required before eviction from all government-funded public housing, they must be incorporated into any hearing procedure established by housing authorities or the department unless the constitutional rights of the tenants are protected by other means.

It has been argued that the decisions establishing the above rights were based in large part upon the fact that, in the particular cases considered, the limited review given the administrative decision by higher authority prevented the tenant from effectively presenting his case.<sup>11</sup> If the argument is correct, it is arguable that constitutional procedural defects in Massachusetts preeviction hearings would be cured by the district court review of the decision in a summary process proceeding brought by the authority against the tenant.<sup>12</sup> It is submitted, however, that a summary process hearing does not, in practice, satisfy the constitutional procedural requirements. In the first place, the district court hearing lacks a specific procedural necessity—district courts normally do not produce a written statement of reasons and supporting facts therefor. Second, the procedural technicalities of district court practice demand that a tenant's defenses be presented by an attorney. Attorneys are usually beyond the reach of most public

<sup>10</sup> *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir. 1970). For similar cases, see *Lefcoe*, HUD's Authority to Mandate Tenants' Rights in Public Housing, 80 Yale L.J. 463, 494-504 (1971) [hereinafter cited as *Lefcoe*].

<sup>11</sup> *Lefcoe* 495-496.

<sup>12</sup> Such review is expressly required by G.L., c. 121B, §32.

housing tenants, however, either because the tenant cannot afford to pay a private attorney or because a legal aid attorney is not available.

There are decided policy advantages that favor a constitutionally sufficient administrative hearing over an inadequate administrative hearing followed by the present judicial review. A full administrative hearing is quicker and less expensive than the present informal hearing and court review. In contrast to the district court, the administrative decision maker would gain expertise from a steady diet of public housing cases and would accumulate a body of written precedent that would serve to standardize decisions, introduce some predictability into the realm of eviction, and generally increase tenant confidence in the overall management of public housing. Finally, an administrative decision maker would perhaps have the power to fashion many different remedies, each appropriate to a particular situation, whereas the district court is essentially limited to either ordering or not ordering eviction.

The benefits of an administrative hearing with all constitutionally required procedures has been recognized by HUD, which has ordered all housing authorities operating federal public housing to establish an administrative grievance procedure guaranteeing full due process rights, not only for evictions but for all management-tenant disputes.<sup>13</sup> HUD's order implies that the procedures are necessary for an effective and fair administrative hearing. The policies behind the Massachusetts public housing statutes and the practicalities of implementing those statutes through a preeviction hearing impel the adoption of similar regulations by the Department of Community Affairs.

The second major question relating to the preeviction administrative hearing under Section 32 is whether the hearing can be constitutionally omitted, as the statute now permits, in cases where the tenant has failed to pay rent.<sup>14</sup> In defense of the statutory policy, it is occasionally said that nonpayment cases are uncomplicated and leave little room for conflicting evidence. Clearly, however, good faith disputes may arise over such issues as the amount of rent actually owed, the tender or acceptance of payment, the granting of extensions, or the legality of rent withholding. Due process is no less constitutionally required in nonpayment evictions than it is in others. In determining whether a hearing is constitutionally required, the need for due process may have to be balanced against its administrative cost and against the cost in rental income to the whole housing project if the eviction of a nonpaying tenant is delayed, but it is submitted that such costs are small. The administrative cost of extending the hearing to nonpayment evictions in itself is negligible, since the hearing mechanism must already be established for other evictions. The cost of delaying eviction is certainly exaggerated, because many nonpayment evictions involve the past delinquency of a tenant who is paying rent at the

<sup>13</sup> RHM 7465.9. See §12.11 *supra*.

<sup>14</sup> G.L., c. 121B, §32 explicitly exempts the hearing requirement in such cases.

time of the threatened eviction. A delay in eviction in such an instance to allow for a hearing would impose no financial loss on the housing project.<sup>15</sup> If constitutional due process requires a hearing in other eviction cases, the reasons for omitting it in nonpayment cases do not seem weighty enough to tip the constitutional balance in favor of omission. The department should by regulation extend the right to a hearing to all evictions,<sup>16</sup> and indeed to all other management-tenant disputes,<sup>17</sup> as the HUD grievance procedure does. The right to a hearing in noneviction cases should not depend upon the chance assignment of a tenant to a federal rather than a state housing project.

**§12.13. Rental assistance.** Many low-income tenants in private housing have recently discovered that the Commonwealth's rental assistance program, because it allows the use of privately owned units, is the easiest and quickest way to secure suitable housing at reasonable cost.<sup>1</sup> The program is particularly appropriate in those cities and towns in which the local housing authority either is not operating or is inactive. Although suitable private units may be scarce, tenants have often been able to locate such units whose owners are willing to participate in the rental assistance program. It has therefore become important to determine whether and under what procedure a tenant may receive rental assistance (1) where the local housing authority has not formally established the program, and (2) where no local housing authority is operating.

Normally, the cooperation of the housing authority is a prerequisite to the receipt of rental assistance: Chapter 121B of the General Laws provides that no rental assistance lease can be executed until a maximum rent scale is adopted by the local authority and approved by the DCA.<sup>2</sup> By implication, in those cities and towns where an authority is operating but has failed to establish the program by securing approval of a maximum rent scale, rental assistance would not seem to be available. The statute further provides, however:

<sup>15</sup> Even if the tenant is not paying at the time of eviction, the housing authority might effectively avoid financial loss in most cases by negotiating a gradual repayment schedule with the tenant rather than evicting him. The practical trouble and expense of later suing the evicted and often judgment-proof tenant makes any victory Pyrrhic.

<sup>16</sup> The language of Section 32 of Chapter 121B would not prevent such an extension of the hearing right by regulation. The language now serves to limit the tenant's right to demand a hearing, and does not preclude the department from extending, if it so chooses, a broader right to the tenant.

<sup>17</sup> Where a tenant in federal public housing requests a hearing on a nonpayment eviction, HUD suggests requiring the tenant to deposit the disputed amount in escrow. RHM 7465.9, Appendix I, par. 5(d). Such a requirement, however, should not be adopted by the Commonwealth because it may effectively deny a hearing to many tenants who are unable to take the disputed amounts out of their limited budgets at one time.

§12.13. <sup>1</sup> Some characteristics of the rental assistance program are noted in §12.10 *supra*.

<sup>2</sup> G.L., c. 121B, §43. The maximum rent scale is an agreement between the housing authority and department that the authority will not lease a unit whose total rent exceeds the rent for a unit of comparable size as established in the scale. The adoption of an unrealistically low rent scale is one way to frustrate the program.

If a resident . . . is eligible for rental assistance and locates or occupies a standard dwelling unit other than the one leased by the local housing authority and if said dwelling unit and the rental thereof is reasonable and acceptable to said housing authority . . . and if the owner of said unit is willing to enter into a leasing agreement with said authority, said authority *shall* within thirty days . . . execute a lease. . . . All housing authorities shall make application to the department . . . for funds with which to participate in the rental assistance program.<sup>3</sup> [Emphasis added.]

The question arises as to whether the initiative power granted to the tenant by the above-quoted language applies only when the program has already been established, or whether it confers a right to receive rental assistance despite the authority's failure and even refusal to so establish. The legislative intent becomes clearer after recognizing that, at the time the quoted language was added to the statute, the rental assistance program had languished in the hands of the local authorities; the original \$1 million appropriation had not been fully utilized in the four years since the program had been created.<sup>4</sup> These circumstances and the mandatory language of the amendment indicate that the legislature's purpose was to expand the program, and that the legislature chose to achieve that purpose by giving prospective rental assistance tenants the authority to exercise their own initiative, regardless of the degree of cooperation rendered by the housing authority. The legislature's purpose is clearly indicated in the last sentence of the amendment: "All housing authorities *shall make application* . . . for funds with which to participate in the rental housing program."<sup>5</sup> (Emphasis added.) To read the amendment as merely allowing a tenant to find his own unit after the housing authority has established the program would frustrate the amendment's purpose.

To compel a housing authority to execute a rental assistance lease in accordance with the terms of the amendment, a tenant might seek relief in mandamus.<sup>6</sup> Similarly, the DCA itself might enforce compliance by writ of mandamus under its general standing to enforce Chapter 121B in equity.<sup>7</sup> The most persuasive and beneficial approach to compliance, however, would be for the department to issue compre-

<sup>3</sup> Ibid., as amended by Acts of 1970, c. 854, §1.

<sup>4</sup> Assuming as a rough estimate an annual subsidy of \$1000 per unit, less than 250 units per year on the average were assisted under the rental assistance program, compared to the more than 58,000 units of public housing administered by Massachusetts housing authorities under other programs.

<sup>5</sup> G.L., c. 121B, §43.

<sup>6</sup> But see *Sullivan v. Fall River Housing Authority*, 348 Mass. 738, 205 N.E.2d 701 (1965) (tenant may not himself sue in equity to prevent an allegedly unlawful rent increase by his housing authority). The statute construed in *Sullivan*, however, (former G.L., c. 121, §26U, now recodified as G.L., c. 121B, §32), dealt expressly with the requirement that the predecessor to the department review and approve proposed rent increases. The rental assistance tenant initiative amendment, on the other hand, clearly recognizes a right in the tenant himself, independent of the department.

<sup>7</sup> G.L., c. 121B, §29.

hensive regulations covering not only tenant-located units but also the program and its administration generally. The lack of such regulations has been a significant factor in under-utilization of the program by housing authorities.<sup>8</sup> Those authorities that have established the program have found the DCA's guidance often piecemeal and confusing, and occasionally contradictory.

A different problem arises where the obstacle to a tenant's receiving rental assistance is the absence of an operating housing authority in the tenant's city or town. The obstacle is more a legal than a practical one. Since ownership, maintenance, and daily management of a rental assistance unit is the responsibility of the private owner, it would be quite feasible for the department to administer the program directly, without the assistance of a local authority. The tenant would be responsible for finding his own unit, the local board of health could certify the suitability of the unit under the sanitary code, and the DCA could execute the lease through a field representative or even by mail. Statutory authorization for the department to operate a rental assistance program directly in any city or town where no operating authority exists may be found in Section 27 of Chapter 121B: "The department, with the approval of the municipal officers shall have all the powers of a housing authority under this section in order to provide housing for families of low income in any city or town where no housing authority exists."<sup>9</sup> The exercise of housing authority powers by the DCA would be particularly appropriate in smaller towns where only a few tenants may be eligible for public housing and where a housing authority would not otherwise be needed.

**§12.14. Limit on rents.** By the Brooke Amendment in 1969, Congress limited rents in federal public housing to 25 percent of a tenant's income.<sup>1</sup> Although the limitation became effective on March 24, 1970,

<sup>8</sup> For example, the department assured housing authorities and private owners that extra funds would be provided through the rental assistance program to pay for damages caused but not paid for by a tenant, and for a tenant's rental share that proved uncollectible. Nonetheless, many authorities and owners remained wary of the program because the department failed to incorporate this important element of financial security into regulations or any other document purporting to have binding legal effect.

<sup>9</sup> This quoted language is found in the second of the two paragraphs comprising Section 27. The department is granted the powers of a housing authority "under this section," apparently referring to the preceding paragraph; in that paragraph, both general powers (including rental assistance authority) and special enumerated powers are granted to authorities in cities or towns in which rural areas are located. Thus it might be argued that the department's authority "under this section" may only be exercised in such cities and towns. Nonetheless, although the preceding paragraph speaks expressly of an "authority organized in a city or town in which rural areas are located," the department's authority under the second paragraph extends to "any city or town where no housing authority exists." The phrase "under this section" seems intended to clarify the nature of the department's powers, and not to limit their use to cities and towns with rural areas. (The title to Section 27 of Chapter 121B as found in *Massachusetts General Laws Annotated* and *Massachusetts Annotated Laws* is an editorial addition; it is not part of the actual legislation and is not an indication of legislative intent.)

§12.14. <sup>1</sup> See 42 U.S.C. §1402(1).

the actual lowering of rents by housing authorities is still not completed. Questions as to the mechanics of making the adjustment, the definition of *income* to which the 25 percent limitation is to be applied,<sup>2</sup> and the eligibility of tenants receiving welfare for partial refunds of rent, retroactive to March 24, 1970,<sup>3</sup> have hampered speedy implementation of the amendment.

The Massachusetts legislature has recently enacted a similar limitation on rents for state public housing.<sup>4</sup> Since the rent limitation is essentially the same as the one established by the Brooke Amendment for federal public housing, its implementation in state public housing can be expected to encounter similar problems. To minimize confusion and delay, the DCA should issue regulations that, at the very least, set out a simple mechanism for making adjustments, define *tenant income* in detail, and provide for prompt retroactive payments or rent credits. Confusion could be even further reduced if the DCA regulations were identical or consistent with HUD regulations wherever legally possible.

**§12.15. Other recently enacted state laws applicable to public housing.** Recent amendments to General Laws Chapter 186, the chapter that controls landlord-tenant relations in both public and private housing, affect certain common management practices of local housing authorities. Security deposits are customarily required of public housing tenants. Such a deposit, taken in connection with a

<sup>2</sup> Shortly after passage of the Brooke Amendment, HUD issued a circular defining income and what was to be excluded and deducted therefrom to determine the amount to which the 25 percent limit was to apply. Congress found HUD's definition to be over-inclusive (thus leading to higher rents) and enacted a correcting amendment. See 42 U.S.C. §1402(1). HUD altered its regulations accordingly. HM 7465.10. Thus a final settlement of the income definition was not made until almost a full year after the effective date of the rent limitation.

<sup>3</sup> The Brooke Amendment decreed generally that all rents in federal public housing were to be lowered to within 25 percent of the tenant's income. The amendment expressly waived such a reduction for a tenant receiving welfare if HUD determined that the rent reduction would result in a reduction of the tenant's welfare grant (and thus not provide any financial benefit to the tenant himself). In April 1971, the Massachusetts Department of Public Welfare officially confirmed that welfare grants would not be reduced if a welfare recipient had his rent cut under the Brooke Amendment. Mass. Dept. of Public Welfare, State Letter 278 (April 12, 1971). However, the Boston HUD office initially withheld authorization for retroactive rent reductions for the 13-month period between March 24, 1970 (the effective date of the Brooke Amendment), and April 12, 1971 (statement of the Welfare Department's "no-reduction" policy). The failure to make such retroactive payments would have deprived tenants on welfare of substantial sums, the receipt of which would, in some cases, have prevented evictions for nonpayment of rent. The Massachusetts Alliance of Public Housing Tenants and the Massachusetts Welfare Rights Organization in June 1971 joined in a petition to HUD seeking approval of retroactive rent reductions, and on August 23, 1971, approval finally came.

<sup>4</sup> Acts of 1970, c. 853, amending G.L., c. 121B, §40 (elderly housing); Acts of 1971, c. 1114, §1, amending G.L., c. 121B, §32 (family housing); Acts of 1971, c. 1114, §8, amending G.L., c. 121B, §44 (rental assistance). Rent which includes utilities may not exceed 25 percent of a tenant's income; rent not including utilities may not exceed 20 percent. Additional state subsidies to make up for lost income to housing authorities are also authorized.



lease executed after January 1, 1971, may not now exceed two months' rent; interest of 5 percent is to be paid to a tenant on any security deposit held for more than a year.<sup>1</sup> The security deposit, less allowed deductions, must be returned to the tenant within 30 days of the termination of his lease; willful failure to return the security deposit subjects the landlord to liability in the amount of twice the retained deposit plus interest.<sup>2</sup>

The Commonwealth has also acted to prevent the assessment of extraordinary penalty fees in cases of nonpayment of rent. When a tenant pays his rent late, many housing authorities add a "late fee" to the amount owed. Such a practice is now restricted by a 1969 amendment that prohibits the imposition of "any interest or penalty for failure to pay rent until at least thirty days after such rent shall have been due."<sup>3</sup> By implication, the amendment may also restrict the use of another common practice, the routine issuance of a 14-day eviction notice to a tenant who is late in paying rent. In such cases the authority in fact has no actual intent to evict and is using the notice only as a rent collection device. The tenant is, nonetheless, additionally charged with the costs of service. Such a practice constitutes a "penalty" and now cannot legally be utilized until 30 days after the rental due date. A housing authority may be allowed to send an earlier notice, but only where the authority could show that it actually intended at the time the notice was sent to evict the tenant. The notice may not be used simply as a club to compel rental payments. Some housing authorities have failed to implement either of the new statutory provisions, perhaps because of ignorance or because of uncertainty as to their application to public housing.<sup>4</sup> It would, therefore, be useful and appropriate for the department to issue regulations specifically applying the provisions to public housing so as to eliminate such confusion.

**§12.16. Tenant organizations.** An increasingly common feature in the formulation of public housing policy has been the participation of tenant organizations, which have made their collective influence felt throughout the Commonwealth. Perhaps their most significant activity, in terms of long-range effects, has been their involvement in the writing and implementation of regulations for state public housing programs.<sup>1</sup> In 1971, tenant groups that had actively supported the

§12.15. <sup>1</sup> G.L., c. 186, §15B, added by Acts of 1969, c. 244, §1.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> The office of the attorney general has unofficially indicated that Section 15B of Chapter 186 applies to all lessors, housing authorities included. (Letter of Assistant Attorney General Robert Condlin to the Quincy Housing Authority, Nov. 10, 1971.)

§12.16. <sup>1</sup> The highlighted tenant activities are by no means exhaustive. The authors have personal knowledge of local tenant organization activity in Cambridge, Somerville, Boston, Worcester, Chelsea, Fall River, New Bedford, Lowell, and Brockton.

Regulations have not been the sole concern of tenant organizations. During the spring of 1971, the Cape Cod Tenants Organization was formed by low-income families to protest the lack of year-round housing, especially public housing, on the Cape. As a result of the protest, the rental assistance program was expanded, applications were

Commonwealth's modernization program<sup>2</sup> formed the Ad Hoc Modernization Committee to insure that the department would issue regulations guaranteeing tenant participation in the modernization program. After more than six months of negotiations between the Ad Hoc Committee, the DCA, local housing authorities, and the governor's staff, the DCA issued regulations prescribing the contents of applications for modernization funds.<sup>3</sup> In Lynn, three tenant councils from state public housing projects, the Lynn Housing Authority, and the DCA negotiated a memorandum of understanding to satisfy the regulatory requirements with respect to nonphysical improvements and to settle an outstanding lawsuit brought by tenants against the DCA and the housing authority.<sup>4</sup> The memorandum contains, *inter alia*, the following provisions: (1) formal recognition of the tenant groups; (2) a statement of the respective rights and duties of the parties, including a requirement that the tenant groups approve any modification of management policy or procedure; (3) adoption of a new lease and a grievance procedure that, as a minimum, guarantee to tenants of state public housing projects the same rights and privileges guaranteed to tenants of federal public housing projects; (4) the revision of specific maintenance practices, including the establishment of a 24-hour, 7-days-a-week emergency maintenance service; and (5) agreement to submit all disputes concerning the implementation of the memorandum to binding arbitration.

The Massachusetts Union of Public Housing Tenants<sup>5</sup> is an active statewide tenants' organization whose general purpose is the advancement of

the rights and welfare of public housing residents and those in need of public housing by promoting public housing tenants' organizations in every city and town in the Commonwealth where there is public housing and by coordinating the efforts of those organizations towards concerted action on issues and problems affecting public housing residents.<sup>6</sup>

Formal business of the organization is conducted by its delegates and officers. Every city or town having members is "entitled to send two (2) delegates . . . to conventions of the Union."<sup>7</sup> During 1971, the union held state conventions in Medford and Worcester. At the

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submitted for federal funds, and proposals were advanced to build or acquire public housing. Although the need for increased public housing on the Cape had existed for many years, it was not recognized or acted upon until the tenant organization took its stand.

<sup>2</sup> The modernization program has been passed as Acts of 1970, c. 694, §2, amending G.L., c. 121B, §26.

<sup>3</sup> Mass. Dept. of Community Affairs, Rules and Regulations for Modernization Projects par. 3(f) (Mar. 16, 1971). See §12.8 *supra*.

<sup>4</sup> Memorandum of understanding (Nov. 4, 1971).

<sup>5</sup> Formerly the Mass. Alliance of Public Housing Tenants.

<sup>6</sup> Mass. Union of Public Housing Tenants, By-Laws art. III, §1.

<sup>7</sup> Id. art. IV, §2.

latter, twelve cities were represented. Between conventions, the officers of the union met at least monthly and engaged in such projects as the preparation and distribution of handbooks on leases and grievance procedures, on the Brooke Amendment, and on the state and federal modernization programs; the preparation and distribution of a model lease; the submission of a petition to HUD to implement the Brooke Amendment; and the submission of comments to the DCA concerning its proposed regulations. Recently the union has negotiated with the DCA concerning the form and content of proposed regulations.

**§12.17. Regulations for the Commonwealth's public housing.** In past years, the administration of the Commonwealth's public housing has been conducted on an informal basis. Acting on the theory that decentralized decision-making produces better results than centralized control, the Department of Community Affairs has vested the local housing authorities with the maximum flexibility and authority to determine housing needs within particular cities and towns, to apply for the state and/or federal programs best suited to meeting those needs, and to operate the resulting housing projects. The department, in turn, has provided technical assistance in the form of advice and services with respect to the planning, financing, and construction of new housing projects. The department has also assisted in establishing management policies and procedures, but until recently no official regulations or other statements of general policy had been published. Assistance to local housing authorities had taken the form of individual responses by DCA staff members to questions from particular authorities, and little attention had been paid to the need to establish comprehensive and consistent policy on certain matters.<sup>1</sup>

The department's procedures often yield unsatisfactory results. First of all, piecemeal policymaking has been a heavy drain on the department. On the one hand, the department has spent considerable time reviewing the questions and actions of local housing authorities, matters that could easily and properly have been decided locally by competent housing authorities and their management under the guidance of general departmental policy. The local authorities, on the other hand, have often found the department unresponsive to their need for complete and consistent information.<sup>2</sup> As tenant organizations have taken increased interest in the Commonwealth's public housing policy, they have focused their attention on issues such as admission and eviction standards, leases, grievance procedures, and tenant participation in management policymaking, issues that affect the entire state housing program and require policy determinations with a statewide point of view. The department has been called upon with increasing frequency

§12.17. <sup>1</sup> The department's approach is in striking contrast to HUD's; the latter publishes extensive regulations and other official statements of both a mandatory and advisory nature.

<sup>2</sup> The information gap seems to afflict particularly the smaller housing authorities, perhaps because such authorities have no professional staff and must depend almost entirely on departmental experience and expertise.

to make such determinations, and its informal procedure of advice and assistance has been placed under acute stress. In addition, the department's historical preference for placing maximum responsibility on housing authorities, whose members are usually middle-class citizens elected at large or appointed by the city mayor, has often resulted in management policies that are not responsive to tenants' rights.<sup>3</sup> Evictions have often been based on the moral judgments<sup>4</sup> of middle-class housing authority managers, which judgments have in practice not been based on the suitability of the evicted person as a tenant. In many instances, management has found it easier to evict imperfect tenants than to attempt to provide needed social services. Tenant groups have increasingly turned to the department to establish mandatory policies that protect tenants' rights. The department is now engaged in the preparation of regulations<sup>5</sup> covering many aspects of the Commonwealth's public housing.<sup>6</sup> Ideally, a comprehensive set of regulations would serve a number of purposes. First, many of the problems pointed out in this article, often the result of gaps or ambiguities in Chapter 121B of the General Laws, should be clearly and definitely answered. The statute requires "cause" for eviction—a regulation should define *cause* to give it operative significance. Second, regulations should better define the rights, duties, and responsibilities of management and tenants. A clear-cut delineation thereof would reduce the potential for arbitrary and unfair actions by management, and make clear to tenants the responsibilities that they must bear and the penalties for failure to do so. Grievances on both sides could be dealt with more

<sup>3</sup> See generally Hartman and Carr, *Housing Authorities Reconsidered*, 35 J. Am. Inst. Planners 10 (1969).

<sup>4</sup> The problem of the interjection of moral judgments by housing authority members into eviction proceedings has been recognized by HUD. A HUD circular dated December 17, 1968, attempted to correct the problem by prohibiting the eviction of a tenant from federally financed public housing except under housing authority criteria " . . . bearing on whether the conduct of such tenants . . . does or would be likely to interfere with other tenants in such a manner as to materially diminish their enjoyment of the premises. Such interference must relate to the actual or threatened conduct of the tenant and not be based solely on such matters as the marital status of the family, the legitimacy of the children in the family, police records, etc.'" HM 7465.12.

<sup>5</sup> Authority for the department to issue regulations is found in G.L., c. 23B, §6, and more specifically in G.L., c. 121B, §29. Section 34(h) of Chapter 121B also requires the department to set uniform standards for tenant preference and selection that are binding on local authorities.

<sup>6</sup> The department has filed with the secretary of state regulations on the following topics: income and occupancy, tenant selection and transfer, housing for the handicapped, collective bargaining (between the housing authority and its employees), and modernization. The modernization regulations have been in effect since the spring of 1971; the rest are to become effective on December 30, 1971. These regulations are less than comprehensive; all of the questions raised in the preceding sections of this article are still unresolved. Furthermore, there is nothing in the regulations comparable to the extensive HUD material pertaining to internal housing authority management.

Secretary of Communities and Development Thomas Atkins, who took office as this article was being completed, has established subcommittees to review and, if necessary, revise all of the aforementioned regulations so that persons applying to or living in state public housing may receive at least the same rights and privileges granted to their counterparts in federal public housing.

fairly and quickly when raised in a framework of rules and regulations. Third, regulations should establish uniform basic policies for all state public housing projects and specifically answer basic questions of public housing policy. Administration of state public housing programs would then be simplified because housing authorities would not have to depend on the department for individual attention and guidance on every matter. Local housing authorities could be encouraged to solve problems at the local level, and the department would spend less time advising individual authorities and more time on the review and improvement of general policy and consideration of unusual problems. Tenants would benefit from uniform observance of basic tenant rights and privileges. Fourth, regulations should, wherever appropriate, eliminate differences between state and federal public housing policies and practices.

Prior to the department's current efforts, its few attempts to promulgate statewide housing policy were haphazard and were frustrated by problems of enforcement. Six months before HUD issued its set of required lease provisions for federal public housing,<sup>7</sup> the department issued its own memorandum on lease forms for state housing.<sup>8</sup> The explanatory comments to the lease form indicated that certain parts of the lease were advisory only, but that other parts were required to be included in family and elderly housing leases actually submitted to the department for approval. The memorandum has been generally ignored by housing authorities in Massachusetts.<sup>9</sup> The reasons for the failure to follow the memorandum are various. Many of the lease provisions imposed new duties on management for the benefit of tenants.<sup>10</sup> Housing authorities have been reluctant to take on these new burdens, just as bureaucratic inertia made them reluctant to make even the less onerous changes. In addition, the lease provisions were themselves in some respects contradictory, failed to incorporate recent statutory requirements,<sup>11</sup> and mandated questionable solutions to pressing problems.<sup>12</sup> No public hearing on the lease provisions was held prior to issuance, thus calling the validity of the issuance into question. The covering language, although stating that some provi-

<sup>7</sup> RHM 7465.8 (Feb. 22, 1971).

<sup>8</sup> DCA Lease Memorandum, §12.6 n.19 *supra*.

<sup>9</sup> Tenants' Rights Report, §12.5 n.18 *supra*.

<sup>10</sup> Included was the duty to make repairs within 60 days (and emergency repairs within 24 hours), to pay the bill for an outside repairman selected by the tenant if repairs were not made within the specified time, to give 24 hours' advance written notice to the tenant before a nonemergency entry into his unit, and to provide various procedural guarantees to the tenant at eviction and grievance hearings.

<sup>11</sup> E.g., the department's model lease (§12.6 n.19 *supra*), paragraph 3, allows the housing authority, when a tenant's rent is more than 10 days overdue, to charge the tenant twenty-five cents for each day in excess of 10 for which the rent remains unpaid. However, Section 15B of Chapter 186 (Acts of 1969, c. 244), enacted more than a year before the issuance of the model lease, prohibits the imposition of such a fee until at least 30 days after the rent due date.

<sup>12</sup> Failure of local housing authorities to make repairs promptly is a common tenant problem. However, allowing the tenant to hire his own repairman, as suggested by the department's regulations, is a burden on the tenant and could lead to a chaotic main-

sions were mandatory, did not indicate clearly that the memorandum applied to all existing leases.<sup>13</sup> No date was set for compliance, and no enforcement mechanism was established. Under such conditions, voluntary compliance by housing authorities was unlikely. The department, due to a shortage of manpower and perhaps to internal disagreements over the wisdom and mandatory nature of the memorandum, has not effectively monitored and enforced compliance: no deadline has been set, no review of lease forms has been called for, and no financial or other penalty has been imposed for failure to comply.

Regulations that fail to achieve goals because of substantive defects can be improved by experience and review; some such failings are inherent in any first effort to deal with such a complex subject. However, regulations issued informally, sporadically, without a unified structure, and without effective enforcement may be worse than none at all. The existence of such nonregulations tends to undermine even the informal authority of the department and to create more administrative confusion. Efforts to improve the substance of such regulations are futile. It is hoped that the format, scope, and enforcement of the regulations now being prepared will avoid these pitfalls and answer the important questions raised in this article.

**§12.18. Conclusion.** Although the existence of state public housing programs in Massachusetts places the Commonwealth far ahead of most other states in meeting the needs of low-income tenants, the state programs have left much room for improvement. The federally financed public housing programs, although not ideal, have had at least three major advantages over their state counterparts. First, subsidies per unit of federal housing have exceeded subsidies available under the Commonwealth's programs. The Massachusetts Housing Act of 1971 was a major improvement, in that it partially bridged the subsidy gap between state and federal projects by adding an increased annual contribution and an operating subsidy to maintain rent levels at or below 25 percent of a tenant's income. Nevertheless, tenants and housing authorities must continue to contend with the markedly poorer physical condition of state projects, caused largely by the earlier shortage of operating funds.

Second, tenants in federal projects traditionally have been afforded greater procedural due process in their dealings with housing authorities. Insofar as such due process has been found to be a constitutional requirement, it must also be granted to tenants in state projects. Notwithstanding the Constitution, however, basic fairness requires equality of treatment of tenants, regardless of the source of funding of their units.

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tenance situation. A rent abatement, as provided in the HUD model lease (RHM 7465.8), seems to be a more practical approach.

<sup>13</sup> By the terms of the memo, only leases submitted to the department for approval were subject to the new regulations; leases already approved presumably were not so subject.

Third, the federal programs have benefited from the existence of comprehensive written regulations, while the state programs have been administered on a more ad hoc basis. As a result, confusion and inaction on large and small issues pertaining to the Commonwealth's public housing has occurred among all parties—the Department of Community Affairs, housing authorities, and tenants. Only recently has the department moved to fill the regulatory vacuum. Comprehensive and well-drafted regulations should remove much uncertainty presently inherent in the Commonwealth's programs. Such regulations can be the vehicle for making tenant-management relations in Massachusetts public housing as progressive as in any public housing in the nation.

### C. STUDENT COMMENT

**§12.19. Eviction of tenants from government subsidized, privately owned low-income housing: *McQueen v. Druker*.**<sup>1</sup> Castle Square is a housing project located in Boston and owned by the defendant Druker. The land on which the housing project is situated was originally acquired by the Boston Redevelopment Authority (BRA) by eminent domain. The BRA deeded the land to City Redevelopment Corp., which in turn deeded it to Druker. The land is restricted to its present use for low- and moderate-income housing by an extensive land disposition agreement between Druker and the BRA; this agreement also gives the BRA continuing control over much of the management of the housing project.<sup>2</sup> Because the land is being used for a low- and moderate-income housing project, the city of Boston agreed to tax the land at a rate far lower than prevailing rates.<sup>3</sup> Druker financed the project through the Federal Housing Authority (FHA) pursuant to Section 221(d)(3) of the National Housing Act;<sup>4</sup> his participation in the federal program enabled Druker to obtain a below-market interest rate on his mortgage, the repayment of which was guaranteed by the FHA.<sup>5</sup>

Beginning in February 1967, William and Patricia McQueen, plaintiffs in this action, occupied an apartment in the Castle Square project under a written lease. This lease expired on July 31, 1967, but was automatically renewable for successive one-year terms unless terminated in writing by either party at least 60 days prior to the expiration date.

§12.19. <sup>1</sup> 317 F. Supp. 1122 (D. Mass. 1970), *aff'd*, 438 F.2d 781 (1st Cir. 1971).

<sup>2</sup> The land disposition agreement sets many standards governing the physical plant; limitations on rental agreements as to amount, duration, and increases; admissions policies; management; and transfer of title. *Id.* at 783-784.

<sup>3</sup> The owners of Castle Square are taxed at a rate of 15 percent of the gross income from the housing project, rather than on the basis of an assessed valuation of the property.

<sup>4</sup> 12 U.S.C. §1715l(d)(3).

<sup>5</sup> Under the Section 221(d)(3) program, the borrower first obtained a mortgage from a private lender at the prevailing market interest rate; encouragement for the making of such mortgage was provided by the FHA's guarantee of repayment. Upon completion of construction, the Federal National Mortgage Association purchased the mortgage note from the lender and reduced the borrower's interest rate to 3 percent.

On May 29, 1970, the McQueens received such a termination notice from Abrams, the project director. The notice itself contained no reasons for the eviction,<sup>6</sup> nor was McQueen granted a hearing by Druker on the reasons for the action.

The McQueens did not vacate the premises, but instead brought a suit against Druker in the federal District Court for Massachusetts, seeking an injunction and a declaratory judgment.<sup>7</sup> Basically, they argued that the attempted eviction violated their civil rights in two respects: (1) the failure to inform them of the reasons for their eviction and to provide a hearing denied them due process of law, and (2) if the court should find that the eviction was motivated by the McQueens' involvement in the activities of the Castle Square Neighborhood Association, the eviction abridged their First Amendment rights.<sup>8</sup> Although there allegedly were many reasons why Druker might have wanted the McQueens evicted,<sup>9</sup> the court found as a matter of fact that the controlling motive for this eviction was a desire to retaliate against McQueen for his efforts in organizing the tenants' association and presenting grievances to the landlord, the courts, and the FHA.<sup>10</sup> The court enjoined the eviction by holding that "the due process clauses of the Fifth and Fourteenth Amendments and the First Amendment are applicable to the defendants";<sup>11</sup> that "plaintiffs here may not be evicted without receiving a notice which specifies good cause for the termination of their tenancy";<sup>12</sup> and that "defendants may not seek to evict [plaintiffs] for exercising their First Amendment rights."<sup>13</sup>

The federal district court reached each of the above conclusions by distinct lines of reasoning. The first issue was whether Druker's actions as landlord should be governed at all by the amendments to the

<sup>6</sup> After the termination notice was given to the McQueens, they were served with a summary process writ for eviction, and Druker's termination of the lease was thereby converted into an eviction by the use of legal proceedings.

<sup>7</sup> Jurisdiction was claimed under 28 U.S.C. §1343, which provides in part: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

<sup>8</sup> "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

<sup>9</sup> These reasons, found in a statement sent to all Castle Square tenants and entitled Management's Reasons for Eviction of the McQueen Family, were: "(1) litigation caused by the McQueen's, [sic] failure on several occasions during the last four years to make rental payments, (2) their defaults in maintenance of their apartment which required excessive repairs, (3) their failure to abide by regulations with respect to washing machines, which led to court proceedings, (4) the conviction of Mr. McQueen for an assault on one of Castle Square's employees, and (5) the McQueen's [sic] attitude." 317 F. Supp. 1122, 1125 (D. Mass. 1970).

<sup>10</sup> *Id.* at 1127.

<sup>11</sup> *Id.* at 1128.

<sup>12</sup> *Id.* at 1131.

<sup>13</sup> *Id.* at 1132.



United States Constitution. This question was answered in the affirmative by the determination that the government had placed its power, property, and prestige behind Druker's actions as landlord, thus qualifying such actions as "state actions."<sup>14</sup> This resulted because Druker had received substantial government subsidies in developing the project, and because many of his actions were subject to governmental control.

The next issue was whether Druker should be required to give a tenant a good-cause notice of eviction. The federal district court based its affirmative answer on the statutory scheme that was designed to spur the development of low- and moderate-income housing.<sup>15</sup> The court asserted that one of the implied goals of the legislation is the creation of an atmosphere of social justice; the court then reasoned that the fulfillment of this goal requires the landlord to have a stated reason for evicting a tenant. The court also asserted that since there must be such a reason, due process requires that the tenant be given a hearing on the sufficiency of the reason.

Finally, the federal district court addressed the question of whether the Constitution prohibited Druker from evicting a tenant in retaliation for the tenant's exercise of his First Amendment rights of free speech and association. The court held that such an eviction was prohibited, for to allow such an action would effectively punish the tenant for exercising his First Amendment rights.

On the issue of state action and retaliatory eviction, the *McQueen* decision follows established constitutional precedents. Subjecting a Section 221(d)(3) landlord to constitutional restraints can be seen as a continuation of the trend whereby many supposedly private activities have been found to include "state action" because of the amount of governmental support involved. The United States Supreme Court has held that the operation of a restaurant with a public parking garage is state action;<sup>16</sup> and the Court of Appeals for the Fourth Circuit has held that the operation of a private hospital supported and regulated by federal and state agencies is state action.<sup>17</sup> In the housing area, a New York federal district court has found state action in a situation involving a Section 221(d)(3) landlord,<sup>18</sup> and a New York state court has reached the same conclusion with regard to a landlord financed under a state program<sup>19</sup> analogous to Section 221(d)(3).<sup>20</sup>

On the issue of retaliatory eviction, the established rule is that a person's continued tenancy in a public housing project cannot be conditioned on his foregoing his constitutional rights.<sup>21</sup> More

<sup>14</sup> See *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

<sup>15</sup> 12 U.S.C. §1715l.

<sup>16</sup> *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961).

<sup>17</sup> *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959, 968 (4th Cir. 1963).

<sup>18</sup> *Colon v. Tompkins Square Neighbors Inc.*, 294 F. Supp. 134 (S.D.N.Y. 1968).

<sup>19</sup> N.Y. Priv. Hous. Fin. Law (McKinney 1962).

<sup>20</sup> *Fuller v. Urstadt*, 28 N.Y.2d 315, 270 N.E.2d 321, 321 N.Y.S.2d 601 (1971). *Contra*: *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949).

<sup>21</sup> *Thorpe v. Housing Authority II*, 393 U.S. 268, 282-283 (1969). *Rudder v. United*

specifically, it has been held by a federal district court in Virginia that an eviction in retaliation against a tenant's activities on behalf of a tenants' association should not be allowed.<sup>22</sup> Although it is true that all the cases in this area have dealt with public landlords, this distinction is made irrelevant in *McQueen* by the decision to treat a Section 221(d)(3) landlord's actions as if they were state actions.<sup>23</sup>

It is unfortunate that the *McQueen* decision does not go on to provide a constitutional basis for the holding that a Section 221(d)(3) landlord is required to give a tenant a good-cause notice of eviction. Indeed, the federal district court's discussion of the issue begins with the assertion that the Constitution does not require the government as landlord to give a tenant a good-cause notice of eviction: "The Constitution permits the federal government as landlord to lease the usual type of premises for a limited period, and to recover the premises by giving an abbreviated notice that the stipulated period has expired."<sup>24</sup> Having thus ruled out the Constitution as the basis for its decision, the court relied on the implied goals of the statutory scheme for low- and moderate-income housing. In support of this approach, however, the court cited two cases in which the analysis of the issue of good-cause notice was based directly on the constitutional mandates of due process.<sup>25</sup> *Vinson v. Greenburgh Housing Authority*<sup>26</sup> involved an attempt by a public housing authority to evict a tenant for no apparent reason. The New York Court of Appeals noted that "[t]he government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law."<sup>27</sup> The court held that it was arbitrary and violative of due process for a housing authority to evict a tenant for no stated reason. The Constitution was also the cornerstone in *Escalera v. New*

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States, 226 F.2d 51 (D.C. Cir. 1955); *Lawson v. Housing Authority*, 270 Wis. 269, 70 N.W. 2d 605 (1955).

<sup>22</sup> *Holt v. Richmond Redevelopment and Housing Authority*, 266 F. Supp. 397 (E.D. Va. 1966).

<sup>23</sup> Moreover, one court has held that the tenant of a purely private landlord should be able to defend a summary process action by claiming that the eviction is in retaliation for the tenant's bringing complaints about housing code violations to the proper authorities. The court's rationale was that the various statutes which provide for the enforcement of housing codes implicitly prohibit the landlord from frustrating such enforcement by threatening to evict any tenant who brings such a complaint. *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968). This rationale has been extended to include a prohibition against evictions by private landlords in retaliation against the formation of tenants' associations, since one purpose of such associations is to report housing code violations. *Engler v. Capital Management Corp.*, 112 N.J. Super. 445, 271 A.2d 615 (1970).

<sup>24</sup> 317 F. Supp. 1122, 1128 (D. Mass. 1970).

<sup>25</sup> "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, §1.

<sup>26</sup> 29 A.D.2d 338, 288 N.Y.S.2d 159 (1968), *aff'd*, 27 N.Y.2d 675, 262 N.E.2d 211, 314 N.Y.S.2d 1 (1970).

<sup>27</sup> *Id.* at 341, 288 N.Y.S.2d at 163, citing *Rudder v. United States*, 226 F.2d 51, 53 (D.C. Cir. 1955).

*York City Housing Authority*,<sup>28</sup> the second decision cited in *McQueen* as requiring a good-cause notice of eviction. In *Escalera*, the Second Circuit Court of Appeals held that due process governs the procedure for evicting a tenant from public housing,<sup>29</sup> and that due process requires a good-cause notice.

The use of the *Vinson* and *Escalera* cases in *McQueen* gives the district court's decision an internal inconsistency: the cases simply do not support the rationale in *McQueen* concerning the implied goals of statutory schemes. Furthermore, given the fact that the federal district court was aware of the *Vinson* and *Escalera* cases, one must question the court's choice to ignore the constitutional reasoning of those cases. First of all, the assertion in *McQueen* that the Constitution does not require a good-cause notice was based on *United States v. Blumenthal*,<sup>30</sup> a 1963 decision by the Third Circuit Court of Appeals. In that case, however, the federal government had leased some surplus property on a temporary basis and was seeking to evict a *business* tenant. The *Vinson* court properly stated that *Blumenthal* was not controlling when the federal government embarked on a program of public housing as a governmental function,<sup>31</sup> since in the latter case the government is providing for the welfare of low-income, ill-housed people, and is not merely gaining revenue from surplus property leased to a business.

Given the fact situation in *McQueen*, therefore, it seems that it would have been more logical for the federal district court to distinguish *Blumenthal* and adopt the rationale of *Vinson* and *Escalera*.<sup>32</sup> Instead, the court relied on what it saw as the implied goals of federal housing statutes. It could be that the court was simply following the traditional rule that the determination of constitutional issues should be avoided if a statutory interpretation will provide an adequate remedy. One can question the court's decision to apply this rule, however, in a situation where the constitutional issues presented have recently been resolved by at least one federal circuit court, and where the statutory interpre-

<sup>28</sup> 425 F.2d 853 (2nd Cir. 1970).

<sup>29</sup> "Although the termination of tenancy procedures afforded by the HA in this case admittedly satisfy the requirements of the Department of Housing and Urban Development circular of February 7, 1967, . . . this is not dispositive of the question of whether the procedures satisfy the due process requirements of the Fourteenth Amendment." Id. at 861. Two state court decisions which have held that due process does not require a good-cause notice of eviction are *Chicago Housing Authority v. Stewart*, 40 Ill.2d 23, 237 N.E.2d 463 (1968); and *Pittsburgh Housing Authority v. Turner*, 201 Pa. Super. 62, 191 A.2d 869 (1963).

<sup>30</sup> 315 F.2d 351 (3d. Cir. 1963).

<sup>31</sup> 29 A.D.2d 338, 341, 288 N.Y.S.2d 159, 163 (1968).

<sup>32</sup> The court might also have looked to the language of Justice Douglas in his concurring opinion in *Thorpe v. Housing Authority I*: "Over and over again we have stressed that 'the nature and the theory of our institutions of government, the principles on which they are supposed to rest . . . do not mean to leave room for the play and action of purely personal and arbitrary power' . . . and that the essence of due process is 'the protection of the individual against arbitrary action'. . . . It is not dispositive to maintain that a private landlord might terminate a lease at his pleasure. For this is government we are dealing with, and the actions of government are circumscribed by the Bill of Rights and the Fourteenth Amendment." (Citations omitted.) 386 U.S. 670, 678 (1966).

tation suggested by the court in *McQueen* had not theretofore been relied on during the housing statute's 23-year history. While the *McQueen* decision on the issue of good-cause notice must be lauded for its attempt to recognize the civil rights of tenants of low- and moderate-income housing projects, it must be questioned whether the decision as written will convince other courts of the inherent justice underlying the requirement of eviction only for cause.

*Massachusetts eviction law.* Massachusetts eviction law before *McQueen* was defined mostly by statutes, with a few significant rules embodied in case law. The general rule was that an estate at will could be terminated by either party by a written notice, if that notice was given at least one rental period prior to the termination date.<sup>33</sup> This rule was limited, of course, by freedom of contract; thus, an estate at will could also be terminated in any manner agreed upon by the parties.<sup>34</sup> Furthermore, the notice requirement was effective only if the tenancy was for an indefinite time period; if a definite time period was specified in the lease, the tenancy ceased at the end of that period, whether or not notice had been given.<sup>35</sup> Finally, if a notice was required, it did not have to state any reason for the eviction.<sup>36</sup> Thus, if a tenant stayed on after the termination of his tenancy, the landlord could obtain a summary process writ of eviction merely by showing that the notice had been given and that the tenant was holding over.<sup>37</sup>

These general rules have been somewhat modified by recent statutes. For instance, under a 1969 amendment to the summary process statute, a tenant may raise as an affirmative defense to a summary process action the claim that the landlord is terminating the tenancy for certain retaliatory reasons.<sup>38</sup> However, the tenant is protected only if the retaliation is in response to his reporting a suspected violation of any health or building code to the proper agency. A similar statute gives a tenant who has reported code violations a cause of action against any person who retaliates against him with some action short of eviction, such as a rent increase.<sup>39</sup>

Another statute enacted in 1969 requires all public housing authorities created by localities<sup>40</sup> pursuant to the Massachusetts enabling act of 1938<sup>41</sup> to give a tenant a good-cause notice of eviction and a preliminary hearing.<sup>42</sup> The statute further requires the district court in

<sup>33</sup> G.L., c. 186, §12.

<sup>34</sup> *Lyon v. Cunningham*, 136 Mass. 532 (1884).

<sup>35</sup> *Adjmi v. Ginter Restaurant Co.*, 291 Mass. 224, 196 N.E. 842 (1935); *Davis v. Murphy*, 126 Mass. 143 (1879); *Dorrell v. Johnson*, 34 Mass. (17 Pick.) 263 (1835).

<sup>36</sup> *Granger v. Brown*, 65 Mass. (11 Cush.) 191 (1835).

<sup>37</sup> G.L., c. 239, §§1-3.

<sup>38</sup> *Id.* §2A, added by Acts of 1969, c. 701, §2.

<sup>39</sup> G.L., c. 186, §18.

<sup>40</sup> Approximately 250 cities and towns in Massachusetts have local public housing authorities funded by the state government. Of these, 33 also receive funds from the Department of Housing and Urban Development (HUD).

<sup>41</sup> Enacted originally as G.L., c. 121, §26K.

<sup>42</sup> G.L., c. 121B, §32, added by Acts of 1969, c. 751, §1.

which a summary process action is brought to review the authority's determination of cause. This procedure seemingly implies that a tenant has the right to defend against such action by claiming insufficient cause. Unfortunately, the statute does not indicate any guidelines for the district court to use in its review of the housing authority's action. Even without the new statute, however, local public housing authorities could not evict a tenant for exercising his constitutional rights;<sup>43</sup> and those local public housing authorities which receive federal aid through the Department of Housing and Urban Development (HUD) would still be required by federal law to give a good-cause notice of eviction and a hearing.<sup>44</sup>

Finally, the enactment in 1970 of the Massachusetts Rent and Eviction Control Act<sup>45</sup> created the possibility of drastic changes in the eviction process. Under this law, any landlord who desires to evict a tenant from a "controlled" rental unit<sup>46</sup> must obtain a certificate of eviction from the local rent control board.<sup>47</sup> Most importantly, the landlord must give his reasons for the eviction, and these reasons must be in compliance with some fairly specific criteria,<sup>48</sup> that is, the landlord must allege good cause. The tenant is also given the right to contest the action and to bring an action against the local rent control board if he feels that he was wrongfully evicted.<sup>49</sup> It should be noted, however, that rent control is not mandatory in Massachusetts; it is merely allowed by an enabling act. Any city or town may accept rent control if it wishes,<sup>50</sup> and the city or town may revoke its acceptance at any time.<sup>51</sup> Nor is the rent control enabling act permanent; by its

<sup>43</sup> *Thorpe v. Housing Authority II*, 393 U.S. 268, 282-283 (1969).

<sup>44</sup> Federally aided authorities are so required by a HUD circular, dated February 7, 1967, from Assistant Secretary for Renewal and Housing Assistance Don Hummel. Although there was at first some question whether this circular was merely advisory or in fact binding on the local authorities, the Supreme Court held that the circular was binding. *Thorpe v. Housing Authority II*, 393 U.S. 268, 274 (1969).

<sup>45</sup> Acts of 1970, c. 842, §§1-14 (Special Laws).

<sup>46</sup> A rental unit is "controlled" unless it is: a unit rented primarily to transient guests or used primarily for charitable or educational purposes; a unit whose construction was completed on or after January 1, 1969; a unit owned or operated by a governmental agency, or a unit whose rents are already regulated by a governmental agency; a unit in a cooperative; a unit in an owner-occupied, two-family or three-family house; or a unit designated by the municipality as a "luxury" unit. *Id.* §3(b).

<sup>47</sup> *Id.* §9(b).

<sup>48</sup> Such criteria include: a failure to pay rent; a violation of a covenant of the tenancy, provided that such violation has continued after the receipt of a written notice from the landlord specifying such violation; the perpetration of substantial damage to the rental unit, or the creation of substantial interference with the comfort, safety, or enjoyment of other tenants; a conviction for using the rental unit for illegal purposes; and a refusal by the tenant to allow the landlord access to the unit to make repairs legally required. The landlord may also be granted the eviction if he plans to demolish the building or use the rental unit for his immediate family. *Id.* §9(a).

<sup>49</sup> *Id.* §10.

<sup>50</sup> As of October 1971, only Boston, Brookline, Cambridge, and Somerville had rent control ordinances.

<sup>51</sup> Acts of 1970, c. 842, §2. A similar Rent and Eviction Control Act was passed earlier for the city of Boston. Acts of 1969, c. 797 (Special Laws).

terms, a municipality's power to adopt rent control terminates on April 1, 1975.<sup>52</sup>

Public and private landlords whose units are regulated by rent control are, in effect, already required to follow the same eviction procedures as those envisioned in *McQueen*. As a consequence, the landlords most likely to be affected by the *McQueen* decision will be the ones who, like Druker, have been aided and are partially controlled by state or federal authorities, and who do not own units in rent control localities. *McQueen* would seem to call upon the state courts, in a summary process action, to require the landlord to show that he had given the tenant a timely notice of termination that stated the reasons for the action. The state court would also have to allow the tenant to challenge the sufficiency of the reasons.<sup>53</sup>

In *McQueen*, the federal District Court for Massachusetts has indicated a willingness to recognize the civil rights of those tenants whose landlords can properly be called "state agents." In doing so, the court has also indicated a willingness to enjoin any threatened summary process eviction in which those civil rights are violated. It would appear, therefore, that Massachusetts state courts will either have to grapple with the decision in *McQueen* or leave themselves open to federal court involvement in the state's eviction procedures.<sup>54</sup>

*The concept of state action.* In protecting the civil rights of tenants, courts are limited by the requirement that the landlord must have acted in some capacity as an agent of "government."<sup>55</sup> However, the *McQueen* decision illustrates the fact that institutions which appear "private" may in effect be governmental agencies, and thus subject to constitutional mandates, if the government is so intertwined in the activities of the institution that those activities may fairly be attributed to the government and thus be called "state action." In the protection of individual liberties, therefore, the search for state action in the activities of private institutions is of primary importance. A discussion of state action might well begin with an examination of the opinion of the First Circuit Court of Appeals in *McQueen*,<sup>56</sup> for the circuit court

<sup>52</sup> Acts of 1970, c. 842, §13. Boston's enabling legislation is to remain in effect "[s]o long as the current public exigency, emergency or distress continues in the city of Boston." Acts of 1970, c. 863, §2.

<sup>53</sup> The task of defining *good cause* is a difficult threshold problem. One guideline seems to be that the tenant must have endangered some aspect of the housing project community, such as its peace, health, or morals. Using this guideline, one court has held that the automatic eviction of a family because there is an unwed mother in that family is arbitrary. *Thomas v. Housing Authority*, 282 F. Supp. 575 (E.D. Ark. 1967). Similarly, an eviction based on the fact that the tenants' 25-year-old son was a drug addict has been overturned. *Sanders v. Cruise*, 10 Misc. 2d 533, 173 N.Y.S.2d 871 (Sup. Ct. 1958).

<sup>54</sup> Federal courts are often seen as being more liberal and less landlord-oriented than state courts. In its opinion in *McQueen*, the federal district court pointed out that the plaintiff would probably not have been heard on the issues in a Massachusetts state court. 317 F. Supp. 1122, 1131 (D. Mass. 1970).

<sup>55</sup> As recognized by the federal district court in *McQueen*, the First Amendment and the due process clauses of the Fifth and Fourteenth Amendments are not applicable to purely private persons. *Id.* at 1127.

<sup>56</sup> 438 F.2d 781 (1st Cir. 1971). Only the state's involvement in the Castle Square project

discussed the subject more thoroughly than did the district court.

The circuit court first analyzed the ways in which Massachusetts became involved in the development of Castle Square, namely, through financial subsidies and a retention of control by the BRA. The opinion also states, however, that more was involved than mere subsidy and control. "Here the landlords are . . . helping the state realize its specific priority objective of providing for urban renewal displacees and its more general goal of providing good quality housing at rents which can be afforded by those of low and moderate income."<sup>57</sup> The circuit court opinion indicates that subsidy and control may be important prerequisites to state action, but that "[n]either factor—or both together—is dispositive of 'state action'";<sup>58</sup> what is necessary in addition is the performance of a governmental purpose by a private institution.<sup>59</sup>

It could be argued that all governmental programs designed to stimulate the private development of low- and moderate-income housing are by definition fulfilling an important governmental function, since both the federal and the Massachusetts governments have taken on the responsibility of providing decent low-income housing.<sup>60</sup> In Massachusetts, the two major programs involve Section 236 of the National Housing Act<sup>61</sup> and the program of the Massachusetts Housing Finance Agency (MHFA).<sup>62</sup> The federal program under Section 236 is much like the older Section 221(d)(3) program under which Druker was financed; in fact, Section 236 was passed in the Housing and Urban Development Act of 1968 to replace the older program. The major difference between Section 221(d)(3) and Section 236 is that under the newer program the secretary of HUD is authorized to insure mortgages<sup>63</sup> and to make interest reduction payments to the lender in order to reduce the interest paid by the owner of a housing project to not less than 1 percent.<sup>64</sup> The Section 236 program actually involves a larger subsidy than existed under Section 221(d)(3), since the interest rate paid by the owner is 2 percent less. Moreover, substantial control over the operations of the landlord is given to the government under Section 236. The secretary of HUD is given the power to pre-

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was discussed because that was the only involvement argued on appeal.

<sup>57</sup> Id. at 784.

<sup>58</sup> Ibid.

<sup>59</sup> The performance of a public function has also been recognized by other courts as being important. " '[I]t is, of course, clear that when a State function or responsibility is being exercised, it matters not for Fourteenth Amendment purposes that the . . . [institution actually chosen] would otherwise be private.' " *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959, 968 (4th Cir. 1963).

<sup>60</sup> However, courts frequently disavow any attempt to prescribe general rules when determining the presence of state action: "[I]t is not necessary or appropriate in this case to undertake a precise delineation of the legal rule as it may operate in circumstances not now before the court." Id. at 967.

<sup>61</sup> 12 U.S.C. §1715z-1 (Supp. V, 1970).

<sup>62</sup> Acts of 1966, c. 708, §§1-17 (Special Laws).

<sup>63</sup> 12 U.S.C. §1715z-1(j) (Supp. V, 1970).

<sup>64</sup> Id. §1715z-1(c).

scribe tenant eligibility requirements<sup>65</sup> and to approve rental charges;<sup>66</sup> in addition, the project must be used primarily for lower-income, elderly, or handicapped tenants.<sup>67</sup> Given the presence of such subsidies, governmental control, and governmental function, one could reasonably conclude that the circuit court's criteria for state action would be met in any housing project developed under Section 236.

Massachusetts aids in the private development of low-income housing primarily through the MHFA. It must first be made clear that the MHFA is in fact a "state agency." Although the MHFA is not allowed to pledge the credit of Massachusetts in issuing notes and bonds,<sup>68</sup> its notes and bonds are tax-exempt.<sup>69</sup> Furthermore, it can be argued that the purpose of MHFA is to create low- and moderate-income housing by subsidizing private developers, since MHFA is authorized to make mortgage loans to private developers.<sup>70</sup> The subsidy results because MHFA provides mortgages at below-market rates;<sup>71</sup> it can do so because the tax-free status of its bonds means that MHFA can acquire money less expensively than a private lending institution. Therefore, at least in theory, every developer financed by MHFA is the recipient of a government subsidy. Moreover, he is also tightly controlled by MHFA. The developer's profits are limited to 6 percent of his equity in the project.<sup>72</sup> He can locate his project only in an area approved by MHFA.<sup>73</sup> Finally, MHFA reserves control over the rental program<sup>74</sup> and the tenant selection procedures<sup>75</sup> of the developer. One could reasonably conclude, therefore, that the *McQueen* criteria for state action would be met in any housing project developed under MHFA.

*Conclusion.* The preceding analysis has indicated that *McQueen* is neither a radical extension nor a radical departure from established constitutional doctrines. Nonetheless, its effect on Massachusetts eviction law is potentially substantial. This would be especially so if, as predicted, the *McQueen* requirements are placed on landlords financed under MHFA, since the number of housing starts under that program has been substantial. It should be remembered, however, that the decision does not affect all the low-income tenants in the state, nor should it be expected to do so. A significant number of landlords in the

<sup>65</sup> Id. §1715z-1(e).

<sup>66</sup> Id. §1715z-1(f).

<sup>67</sup> Id. §1715z-1(j)(5)(c). It is interesting to note that, whereas Druker abdicated his control to such local authorities as the BRA, the kinds of control given up by Druker are substantially the same as those required to be given up under Section 236 of the National Housing Act.

<sup>68</sup> Acts of 1966, c. 708, §9 (Special Laws).

<sup>69</sup> Id. §12.

<sup>70</sup> Id. §5.

<sup>71</sup> "It is therefore imperative that the cost of mortgage financing . . . be made lower so as to reduce rental levels for . . . low income persons and families. . . ." Id. §2.

<sup>72</sup> Id. §5(d).

<sup>73</sup> Id. §5(g).

<sup>74</sup> Id. §6.

<sup>75</sup> Id. §7.



state are neither subsidized nor controlled by governmental agencies, and are thus the essence of the “private individual” to whom the due process clauses of the Constitution are not applicable. Controlling the eviction practices of these landlords would then seem to be exclusively the function of the state legislature. In this context, it is hoped either that rent control will be accepted by more communities, or that the legislature will extend protection to low-income tenants throughout Massachusetts.

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